SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 404

JACK DAVIS, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

against

JACK DAVIS, Appellant

STATEMENT UNDER RULE XIII, SUBDIVISION 4

This action was commenced by the filing of an Information on February 26th, 1945 against the above named appellant for unlawful possession and transfer of gasoline ration coupons in violation of Title 50; Appendix, Section 633 United States Code.

The defendant pleaded not guilty on February 27th, 1945.

On March 7th, 1945, the trial began before Hon. Vincent L. Leibell and a jury and terminated on March 9th, 1945, resulting in a verdict of guilty on Count One and not guilty on Count Three.

On March 23rd, 1945, the defendant was sentenced to six months imprisonment and fined $1,000 and defendant to stand committed until the fine is paid, and was ordered to surrender on March 26th, 1945.

A notice of appeal was filed on March 24th, 1945.

On March 26th, 1945, Hon. Thomas W. Swan, Circuit Judge, allowed bail in the sum of $1,000 pending application to the full Court on April 2nd, 1945.

On April 2nd, 1945, the full Court consisting of Hon. Learned Hand, Hon. Harrie B. Chase and Hon. Jerome N. Frank granted bail pending appeal.

No questions were referred to a Commissioner, a Referee or Master.

[fol. 2] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 119-424

Title 50, App. Sec. 633 U. S. Code

Unlawful possession and transfer of gasoline ration coupons

[Same Title]

DOCKET ENTRIES

1945

February 26th—Filed Information.

February 27th—Pleads not guilty. Bail continued. Moscowitz, *J.*

November 16, 1944—Filed Notice of Appearance by Irving Spieler, Atty. (Docketed 2/27/45),

March 7th—Trial begun before Leibell, *J.* Counts 2 and 4 dismissed on motion of Asst. U. S. attorney, David Hartfield, Jr.

March 8th—Trial continued.

March 9th—Trial continued and concluded. Verdict "Guilty" on Count 1 and not guilty on Count 3. Probation report ordered. Bail continued. Sentence adjd to 3/23/45 Room 506 at 10 A. M. Leibell, *J.*

[fol. 3] March 23rd—Filed judgment. Count One—Six months at a place of confinement to be designated by the Attorney General of the United States, and fined $1,000, and to stand committed until fine is paid or he is otherwise discharged according to law. To surrender March 26th, 1945. Bail continued. Leibell, *J.*

March 23rd—Issued commitment in triplicate.

March 24th—Filed Notice of Appeal.

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Of the February Term in the year of our Lord, one thousand nine hundred and forty-five

INFORMATION

Now comes John F. X. McGohey, United States Attorney for the Southern District of New York, leave having first been had and obtained, and respectfully informs this Court:

That heretofore, to wit, on or about the 20th day of June, 1944, at the Southern District of New York and within the jurisdiction of this Court, Jack Davis, the defendant herein, unlawfully, wilfully and knowingly did have in his possession and control approximately 168 gasoline ration documents of the type denominated "A" in sheet form, representing approximately 504 gallons of gasoline, said defendant being then and there not the person or agent of the person to whom said ration coupons were issued or by whom they were acquired, in accordance with Ration Order No. 5-C and General Ration Order No. 8, duly issued by the Price Administrator; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, Appendix, Section 633, United States Code, and the rules, regulations and orders duly adopted and issued pursuant thereto).

Second Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court: [fol. 5] That heretofore, to wit, on or about the 20th day of June, 1944, at the Southern District of New York and within the jurisdiction of this Court, Jack Davis, the defendant herein, unlawfully, wilfully and knowingly did have in his possession and control approximately 27 gasoline ration documents of the type denominated "T" in sheet form, representing approximately 135 gallons of gasoline, said defendant being then and there not the person or agent of the person to whom said ration coupons were issued or by whom they were acquired, in accordance with Ration Order No. 5-C and General Ration Order No. 8, duly issued by the Price Administrator; against the peace of the United States and their dignity and contrary to the form

of the statute of the United States in such case made and provided (Title 50, Appendix, Section 633, United States Code, and the rules, regulations and orders duly adopted and issued pursuant thereto).

Third Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court:

That heretofore, to wit, on or about the 4th day of August, 1944, at the Southern District of New York and within the jurisdiction of this Court, Jack Davis, the defendant herein, did unlawfully, wilfully and knowingly transfer approximately 300 gasoline ration documents of the type denominated "E" to Lawrence Feldman; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, Appendix, Section 633, United [fol. 6] States Code and the rules, regulations and orders duly adopted and issued pursuant thereto).

Fourth Count

And the said United States Attorney, in the manner and form as aforesaid, further respectfully informs this Court:

That heretofore, to wit, on or about the 20th day of June, 1944, at the Southern District of New York and within the jurisdiction of this Court, Jack Davis, the defendant herein, unlawfully, wilfully and knowingly did have in his possession and control approximately 10 gasoline ration documents purporting to be ration documents, to wit, counterfeit gasoline ration coupons purporting to be of the type denominated "A" which purported to represent approximately 30 gallons of gasoline, under circumstances which would have been in violation of Section 2.6 of General Ration Order No. 8, if the documents had been genuine, that is to say, the said defendant did not know the abovementioned ration documents to be counterfeit, and was then and there not the person or agent of the person to whom said ration documents, if genuine, were issued or would have been issued or by whom they were acquired or would have been acquired, in accordance with Ration Order No. 5C, and General Ration Order No. 8 duly issued by the Price Administrator; against the peace of the

United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, Appendix, Section 633, United States Code, and the Rules, Regulations and Orders duly adopted and issued pursuant thereto including General Ration Order No. 8).

John F. X. McGohey, United States Attorney.

[fol. 7] In United States District Court, Southern District of New York

United States of America

vs.

Jack Davis

Bill of Exceptions—Hearing on Motion to Suppress Evidence

Before: Hon. Vincent L. Leibell, *D. J.*, and a Jury

New York, March 7, 1945;
10:30 o'clock a. m.

Appearances:

John F. X. McGohey, Esq., United States Attorney, for the Government;

David Hartfield, Jr., Esq., Assistant United States Attorney, of Counsel.

Irving Spieler, Esq., Attorney for Defendant.

Mr. Spieler: May it please your Honor, last November you sat at a motion to suppress evidence in this very case, and by a strange coincidence it has been assigned to you. This is the second trial. The first trial resulted in a disagreement, and I have a copy of your opinion here.

The Court: Hand it up.

[fol. 8] (Handed to the Court by Mr. Spieler.)

Mr. Spieler: It seems to me we might have to have a pre-hearing.

(Court examines document.)

. . . . . .

The Court: All right. I will take the testimony, counsellor.

The Government's motion to dismiss counts 2 and 4 is granted and we will proceed to impanel a jury. After the jury is impaneled I will excuse the jurors and then I will take the testimony in relation to the—well, the testimony on the issues, on your motion to suppress evidence. If the Government states now that it intends to use any of the evidence, I will do that, but if the Government does not intend to use any of the evidence thus obtained why of course there is no need of my taking testimony.

Mr. Spieler: That is true. I withdraw my motion if they say they will not use the evidence.

Mr. Hartfield: Well, your Honor has already ruled that you will take the testimony, and without seeking to labor the point and apologizing for taking the Court's time I would like to be heard in respect to that.

The Court: All right, go ahead.

Mr. Hartfield: I believe that the law is such, your Honor, that if the Government conceded the facts which Mr. Spieler states, which we do not concede except for the purpose of argument, that there can be, under recent decisions, no possibility of an illegal search and seizure, then we are wasting time because the issue is not consent here, but the issue is whether or not OPA agents may inspect a gas station and [fol. 9] take coupons which are under the quasi public document theory and amenable to a search and seizure different from the usual privileges granted to private property.

Now Mr. Spieler himself raised this point the last time. It was the greatest point in the argument, and consent went by the board as being of little importance. And just four days after Mr. Spieler made the argument on the basis of a decision out West the case was reversed by the Circuit Court of Appeals, thus proving that Judge Coxe's theory was right. So I say to your Honor that we are wasting time talking here because if we should concede there was an entry forcibly, which we do not, still there is no illegal search and seizure.

Mr. Spieler: If your Honor please, Mr. Hartfield says that I raised the point in connection with the right of OPA inspectors to make inspections. He raised that very point the same way as he has here a few moments ago and I said

to Judge Coxe that even though OPA inspectors have the right to inspect the premises of a gasoline dealer, I said then, and I say now, that that does not deprive a man of the privileges which he gets under the Constitution from unlawful searches and seizures. The OPA, of course, can start suspension proceedings, and put the man out of business but a man shouldn't be tried where his liberty is involved because they claim they had a right to search by reason of this so-called inspection. You do not waive your constitutional rights because they claim they have a right of inspection. That was my argument then and that is my argument now.

Mr. Hartfield: That is not the law. The law of recent date is there are certain things which are quasi-public documents. They are many things. They certainly include [fol. 10] gasoline stamps, sir, and there are decisions holding so. The law says in respect to quasi-public documents there may be a search and seizure and they may be used in evidence whether or not the search and seizure was illegal. That is the point we have here.

Mr. Spieler: May I suggest that Mr. Hartfield give us the citations of those cases because I referred him to those cases which held——

The Court: All right, let us have the cases.

Mr. Hartfield: Bowles vs. Joseph Dennunzio Fruit Co., 55 Fed. Supp. 9; Bowles vs. The Beatrice Creamery Co., 56 Fed. Supp. 80, has been overruled and I do not have the citation—that is the case.

Mr. Spieler: The one by Judge Kennedy?

Mr. Hartfield: Yes.

The Court: Bowles vs. Beatrice Creamery Co., 56 Fed. Supp.?

Mr. Hartfield: Yes, your Honor. I do not have the reversing citation but that case was reversed making the principles not applicable.

The Court: Did you shepherdize it?

Mr. Hartfield: No. I was just informed by the OPA that it had been reversed and I read the decision in the circular which they sent me, which I haven't got now. It hasn't been cited.

The Court: It must be in the advance sheets.

Mr. Hartfield: It probably is. I did not know I was going to get in to this again, your Honor. I thought this was well settled.

I have another very important case which I will give to your Honor. Well—no, here it is. Rodgers vs. U. S., 138 Fed. (2d) 992, at 996.

[fol. 11] The Court: You should have entered an order, you know, after you had your hearing before Judge Coxe and then you would have had your matter disposed of. If you had entered an order it would have been taken care of. You could have entered an order on that hearing.

Mr. Hartfield: Yes.

The Court: Now I will have to make a record here in order to give them an opportunity, if I should decide against their motion to suppress, and if there should be a conviction, give them an opportunity to raise the point in an appellate court.

Mr. Hartfield: Yes.

The Court: All right. We will send for a jury and impanel a jury while we are getting these cases down.

* * * * * * *

(Whereupon the jury was sworn.)

* * * * * * *

MOTION TO SUPPRESS EVIDENCE

The Court: Now, Mr. Spieler, I understand you have a motion to make in relation to certain evidence that was seized at the time of the arrest?

Mr. Spieler: Yes, your Honor.

The Court: A motion to suppress the evidence, is that right?

Mr. Spieler: Yes. Originally the motion was made in a formal manner by preparing affidavits, and it appeared on the calendar in Room 318 in due time. The Government filed answering affidavits and it came on to be argued before your Honor, who was then presiding in Room 318. I think it was some time in November of 1944 when that motion came on. Your Honor decided the motion on November 20, 1944, and you held that the motion was denied without prejudice with leave to renew at the trial.

[fol. 12] I therefore renew the motion on behalf of the defendant to suppress the evidence seized on June 20, 1944, by agents of the Government and certain members of the police department when they searched the premises of the

defendant located in Southern Boulevard, 720, Borough of Bronx, New York.

The evidence seized, as I recall it, is contained in the first count of this information. I think it is 168 coupons designated A which equal the total of approximately 504 gallons, and there were other coupons seized. They may well be the ones which the Government moved to dismiss in those other counts.

The Court: At any rate they do not involve the coupons referred to in count 3 of this information.

Mr. Spieler: That is correct, your Honor.

The Court: That count is not involved in this motion.

Mr. Spieler: That is true.

The Court: One count only.

Mr. Spieler: That is right.

The Court: And what evidence do you claim was seized at that time? The 168 gasoline-ration documents of the type denominated A in sheet form, representing approximately 504 gallons of gasoline?

Mr. Spieler: That is right.

The Court: Referred to in the first count?

Mr. Spieler: That is right, and other documents which the Government offered in evidence in the first trial. I think at that time it was Government's Exhibits 3-A, B, C and D.

The Court: What were those documents?

Mr. Spieler: I don't remember the exact type of coupons they were but I think Mr. Hartfield has them.

[fol. 13] The Court: They were also coupons?

Mr. Spieler: Yes.

Mr. Hartfield: In different form than the others.

Mr. Spieler: And we claim they seized what we call little receipts which we give to customers to indicate to them that they are entitled to a certain quantity of gasoline by reason of the fact that they left the coupons with us: In other words, if they left two coupons which entitled them to six gallons of gasoline we gave them a certain type of receipt, so when they came to our place of business some day in the future, why they would have to present first that receipt, but principally the coupons——

The Court: Well, I thought you had to present your coupons when you bought your gas.

Mr. Spieler: That is true. In this case it will develop, if your Honor rules against me, that these coupons, which are the subject of the first count in the information, were given to the defendant by some of his customers to be held by him so that when they came in—whenever they came in they could get gas on those coupons. For their own protection they would take receipts from the defendant.

The Court: Why do they have to do that for, counsellor? Why don't they keep their coupons on their person, just as easily as they could keep his receipts?

Mr. Spieler: Well, that could be easily explained at the proper time.

The Court: All right.

Mr. Spieler: On the question of why they did certain things I guess we are not to be blamed for that. As it will be developed the question is whether we got these things lawfully or whether we bought them or whether we manufactured them or found them. Our defense is, you might as well know now, that we got them from customers.

[fol. 14] The Court: But you claim that the Government obtained possession of them illegally, is that right?

Mr. Spieler: That is true.

Mr. Hartfield: Now, your Honor, may I be heard in respect to the motion?

The Court: Yes.

Mr. Hartfield: I have two things in respect to that motion that I would like to say, and since they may appear inconsistent they warrant some explanation.

First I say that if every claim of illegality which Mr. Spieler claims the Government committed, if we did many more acts than which Mr. Spieler claims we committed, if we came in there with guns and ammunition and forced everybody to lay down and search the place without a warrant, I say to your Honor that under the law of quasi-public documents in this particular situation there could be no illegal search and seizure, and I say that to your Honor on the authority of Rodgers vs. The United States and Joseph Dennunzio vs. The United States, cited to you earlier.

The Court: All right, I will look at that Dennunzio case. That is No. ——

Mr. Hartfield: 55 Fed. Supp. 9. The most important case, your Honor, we have found is the Rodgers case.

The Court: All right, I will look at this 55 Fed. Supp. (Examining.)

Well assuming you have the right to inspect records that the defendant was required to keep under OPA regulations issued pursuant to the statute, and that you are entitled to access to these records, how would that give you any right to seize the stamps?

[fol. 15] Mr. Hartfield: In this respect: The regulations which deal with gasoline coupons say—and I am getting the citations for you and the regulation in a second—that coupons A are not the property of the person to whom they are issued. They are the property of the United States. They are records required to be kept at a place of business, and therefore as soon as anybody puts up any resistance to looking at or checking those coupons, we have a right to go in and get them by any means we want. There is this section:

"All records, reports, forms, accounts, or other documents required by Ration Order No. 5A or Ration Order No. 5C to be prepared and kept by any person, and the gasoline facilities of any person, shall be subject to the inspection of the Office of Price Administration and its employees, by the employees of any state motor fuel tax administration, and by such other personnel as the Office of Price Administration may designate. Such inspection may be made at the place of business of any such person during regular business hours, or, in the case of matters prepared on forms of the Office of Price Administration, at any time and place designated by the Office of Price Administration."

Hence, whenever a request to make an inspection is made, you call the witness down and make the inspection, and you find things which are a crime being committed in and of themselves, you are entitled to seize that. They are fruits of a crime. You are entitled to seize them at that time.

The Court: Well, as I understand your contention that the right of the OPA was to inspect the records of this defendant to operate a gasoline service station, I suppose?

Mr. Hartfield: Yes, sir.

[fol. 16] The Court: That right, you say, to inspect the records gave you the right to seize the stamps. You do not claim the stamps were records?

Mr. Hartfield: Yes, they are by another section which I am about to read.

The Court: All right, read it.

Mr. Hartfield: "Every dealer and intermediate distributor shall be accountable for all gasoline, ration credits, gasoline deposit certificates, coupons and other evidences received by him. Gasoline deposit certificates, coupons and other evidences received at or for a place of business shall be, at all times when the dealer is open to transact business, retained by him as the place of business for which they were received," etc., etc.

Now I call your attention to this language: "gasoline, ration credits, gasoline deposit certificates, coupons and other evidences received by him" shall be available when they want to inspect them, and that is under the section entitled "Records to be kept by dealers and intermediate distributors."

The Court: You claim that that right to the inspection gives you the right to break into any part of his store in order to examine those records?

Mr. Hartfield: During business hours, yes, sir, which the statute specifically says when they should be kept there and so forth.

The Court: Well——

Mr. Hartfield: And, your Honor, I will refer you to Rodgers against the United States where it is held that these quasi-public documents that came under the Agricultural Adjustment Act are not subject to the provisions against search and seizure, that the courts there are not particular as to the rights——

[fol. 17] The Court: I think the United States Supreme Court is mighty particular.

Mr. Hartfield: Well, they are the highest authority we have on this matter, Rodgers vs. The United States, which is a Circuit Court of Appeals case.

The Court: Yes, but it doesn't relate to stamps.

Mr. Hartfield: It relates to records required to be kept.

The Court: It relates to books and records, to records and reports—"papers, records and reports required by law to be kept and made in order that suitable information may be obtained of transactions which are appropriate subjects of governmental regulation."

Mr. Hartfield: And I submit that these coupons under this statute are such records. In fact they are more so than in the Rodgers case. In the Rodgers case it was the personal property of the defendant which was then subject to seizure under the quasi-public doctrine or theory. Here the gas stamps say on them that they are the property of the United States and only lent to the person. That is even more quasi-public than in the Rodgers case.

The Court: What happened to the Rodgers case? Did it go up?

Mr. Hartfield: No, sir, it did not. At least I am sure to the best of my knowledge it did not.

The Court: Has it been cited?

Mr. Hartfield: I don't know that.

The Court: Why don't you shepherdize a case before you cite it to me?

(To Bailiff) Ask Miss Merz to shepherdize this case for me, please.

Mr. Hartfield: I did shepherdize this before the last trial but I did not know we were going to get into this question. [fol. 18] The Court: I will make a complete record of the matter. I will take the testimony in the absence of the jury, testimony in relation to the seizure of certain documents which may be used by the Government in connection with its proof under count 1 of this information.

All right, proceed.

Mr. Hartfield: Mr. Fitzpatrick.

Cyril G. Fitzpatrick, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

By Mr. Hartfield:

Q. Mr. Fitzpatrick, what is your occupation?

A. I am a detective employed by the New York City Police Department.

Q. Do you remember what you were doing on June 20th?

A. I was assigned to the Government in the Office of Price Administration.

Q. Did you go to Southern Bouleyard?

A. Yes, sir.

Q. Where in Southern Boulevard?
A. 723 Southern Boulevard.

The Court: What date?
The Witness: On June 20th.
The Court: What year?
The Witness: 1944.
Mr. Spieler: Your Honor, I don't like to interrupt, but may we have the other witnesses excluded while this witness testifies?
[fol. 19] The Court: Yes. The witnesses will wait in the witness room outside.

(Witnesses leave the courtroom.)

The Court: Go ahead.

Q. Who accompanied you there?
A. Agent Pearman, Tarter, Sussman and Detective Colby.
Q. What did you do before you entered the station of Jack Davis?
A. I was parked in an automobile across the street in conversation with these agents.
Q. And did you see the agents or any of the agents do anything?
A. In my presence a $5 bill was marked and given or taken by one of the agents and he left and entered the premises.
Q. Now did you see one or two $5 bills marked?
A. One at that time.
Q. And then did you, after a while, after wait of a while, go anywhere?
A. I did.
Q. Where did you go?
A. I went into the auto laundry owned by Davis.
Q. And about what time of the day was that?
A. Oh, it was around one o'clock.
Q. And whom did you see on the premises?
A. There was a girl giving gas—a gas dispenser.
Q. Was she white or colored?
A. A colored girl.
Q. And what was her name?
A. Steele. The first name Vivian, I think.

Q. Did you have any conversation with her?
A. I did.
Q. What did she say to you?

[fol. 20] Mr. Spieler: Unless the defendant was present I am going to object to the conversation between this witness and Vivian Steele.

Mr. Hartfield: This is on the question of probable cause, your Honor.

The Court: Yes. Denied.
Mr. Spieler: Exception.

A. I asked her job there and she told me she was a gas dispenser. I asked her who owned the place. She said a fellow by the name of Jack Davis. I asked her where he was. She said he wasn't there at the time, he was out. I asked her if she had sold gas to this man, indicating Agents Sussman and Pearman. She said she had.

The Court: She had not?
The Witness: She had.

Q. Did she say she had used coupons in the sale?
A. I asked her then to give me the money that she had received and she took from her pocket a quantity—or a quantity of dollar bills and $5 bills, and Sussman took it from her hand. I didn't take it.

Q. Do you remember the money she said she received was over or below the ceiling—was that over or under the ceiling price of gasoline?

A. Well, it wasn't until after that that question came up.

The Court: All right, but she turned over this marked $5 bill?

The Witness: She did—no, two $5 bills, one of which was [fol. 21] given to her by Sussman and one by Pearman.

The Court: These were two $5 bills that had been marked in advance by the agents?

The Witness: By the agents Sussman——

The Court: In your presence?

The Witness: Yes, and in addition to that he had taken the numbers of them.

Q. Then what happened?

A. Then she said in my presence that she had sold the gasoline to them because she thought Sussman was a bookie

and that she had known him, and she was asked then "Why?" She said that the boss had said that she could sell the gas to anybody that she knew or that was recommended by him.

Q. Then what happened?

A. And he asked her, Sussman asked her if she knew him, and she said no, except that she thought she had seen him before, but she did not know him, and Pearman asked her if she knew him and she said no.

So then the question was as to how much to charge for the gasoline and what change had been received by Sussman, and Sussman said to her "I gave you a $5 bill and you charged me at the rate of 60 cents," and she said——

The Court: A gallon?

The Witness: A gallon.

A. (Continuing) —and she said, "I don't know. I have it on the slip here." She then took——

Q. When did Davis appear?

A. He did not show up yet. He wasn't there for another—oh, 20 minutes to a half hour.

[fol. 22] Q. When he did come in in about 20 minutes——

A. He did.

Q. —Did you show him your credentials?

A. I did.

The Court: You are skipping something, counsellor. He was telling you part of a story.

(To witness) Go on with your story about the 60 cents a gallon.

A. (Continuing) And that she said she had the record in her pocket and she took from her pocket then a slip of paper on which was marked the amounts of money that she had collected over and above the regular price of gas, and she stated that the reason she had this slip was to let her boss know what she collected, and she had her account for the amount of gas dispensed with. She had to have for the gas had a certain rate with the coupons and another rate without the coupons, and that is why she kept the record.

Q. Then what happened?

A. In about—we waited around then for about 20 minutes to a half hour when a Cadillac car entered the entrance for the washstand, which is a conveyor type washstand run-

ning from one block to another, and from the car emerged Jack Davis.

As he approached us, coming towards where we were standing at the gas pumps the girl then said "This is Davis."

Davis then approached us and he was accosted by Sussman who asked him who he was and his identification, and if that was his car, and he said it was. He also asked him if he—if this girl worked for him and he said she did, and if he had allowed the girl to sell the gas at above the ceiling [fol. 23] prices, and Davis didn't answer him. He then told him that the girl had sold him and another agent a quantity of gasoline above the ceiling prices and said, "I want to look at your car." Davis and Sussman then went to the Cadillac car on the washstand and examined it.

They then returned to where we were standing and the conversation went on about the sale of gas, the amount of gasoline capacity for the place, the amount of stamps they took in, where they were kept. Davis stated that the stamps were kept in small metal containers attached to the pumps.

Q. Excuse me for interrupting you, but before you get to that, was there a time when you brought Vivian Steele face to face with Davis?

A. At this time they were talking together.

Q. Did she then tell the same story in the presence of Davis?

A. She did.

Q. That we have just gone over before?

A. Yes, sir.

Q. All right. Now would you continue. I am sorry to have interrupted you.

A. (Continuing) And that the keys for these particular tin boxes were in the possession of Davis. The boxes were then opened.

Davis was accompanied by Agent Tarter. The contents of the boxes were taken by Tarter, counted and enumerated and entered upon a sheet. Then the stick for measuring the gas tanks was brought out and the gas tanks were examined for their contents, and as a result of the tabulation by Tarter and Davis and Vivian Steele it was determined that he was short.

Q. Now when you say "short" what do you mean by that?

A. With his capacity. He had a certain amount of gasoline stamps credited.

[fol. 24] Q. These were in the boxes attached to the pumps?

A. Yes, sir, they were.

Q. And did he say—did you ask him whether there were any more stamps?

A. We did.

Q. What did he say?

A. He said there were not.

Q. He said the only stamps they had were in those boxes attached to the——

A. Attached to the pumps, yes, sir. At that time the gasoline was five hundred and some odd gallons out of the way. The correct number—I don't know as I didn't make the tabulation.

Sussman and I accompanied Davis into the outer office, which is a waiting room to his private office, the door of the private office being locked. We sat there and had a conversation in regard to his capacity, the amount of gasoline he had on hand and the sale of the gasoline above the ceiling prices.

Q. Mr. Fitzpatrick, I asked you—you say you do not know the exact number. Was it 1,500, 500 or 1,000 do you know?

A. The overage?

Q. The shortage.

A. The shortage?

Q. At the time you went in.

A. Well, at the time we went in it was five hundred and some odd gallons. But the correct amount was tabulated afterwards by Tarter.

Q. You did not count it, so you don't know?

A. I said that. I didn't count it, so I don't know.

Q. All right.

A. But when I spoke to Tarter I said to him "What is the shortage?" and he said "five something," but at that time they still had more pumps to figure out and more stamps to count.

Q. You then talked to Davis for about how long?

A. Oh, the best part of an hour, three-quarters of an hour to an hour.

[fol. 25] Q. Did he eventually get the keys to his place or didn't he?

A. Well, Davis was told that he was under arrest on account of this overcharge, and that I had a conversation with Davis and told him the best thing was to open the door, give them whatever stuff he has and see how he would make out. He said, "I have a sufficient amount of stuff to cover the shortage."

The shortage was then over 1,100. That was another count that Tarter gave me.

Q. Now I show you here coupons of the A10, A11, A12 type and ask you if you found coupons of that type at any time when you were at Davis's place (handing to witness)?

A. Yes, sir, these are coupons taken by Davis from a small metal cabinet inside his private office and handed to Agent Sussman.

Q. Did he take them himself, Davis?

A. Davis took them from the cabinet and gave them to Sussman.

Q. And did you at any time threaten to break the door down?

A. No, sir. The office door you mean?

Q. Yes. Did you hear anyone else threaten to do that?

A. No, sir. The question about the office door was that he didn't have the keys, that Davis didn't have the keys.

The Court: Is that what he said when you asked to go in it or what?

The Witness: I explained the law to Davis in that I told him that these were Federal agents, "They have you now for one rap. The rap is the over-the-ceiling prices of gasoline. You are now under arrest, and any property in the office will be seized by them." I said, "The best thing to do is to open the door and save a lot of time."

[fol. 26] He wanted to know what would happen to him. I said, "Well, you have an OPA violation and you have an arrest now, and this is certainly going to be tough, and if you have any more stuff you might as well give it to him."

After a period of three-quarters of an hour to an hour Davis then received the keys and opened the door——

The Court: Where did he get the keys?

The Witness: He got them from Pearman, an agent.

A. (Continuing) He opened the door to an inner office and walked about 10 feet into it, and with his back turned

to me he opened a metal cabinet and took therefrom several envelopes. I think there were seven or nine envelopes, and handed them one after another to Sussman. Sussman opened them, looked at the contents and put them down on the desk. I took the top—the contents of a desk at the right of the door, which contained a tire—a quantity of tire certificates and a quantity of bingo sheets. Those are the sheets where the stamps have already been pasted on. I questioned Davis as to the tire certificates. He said he got them in the natural course of business. I questioned Davis as to the bingo sheets and he said those were ones that he had received in the course of business.

Mr. Hartfield: That is all I have with this witness.

Cross-examination.

By Mr. Spieler:

Q. Now, Mr. Fitzpatrick, on June 20, 1944, you went to the premises of this defendant at 720 Southern Boulevard, Bronx, New York?

A. Yes, sir.

Q. With other men, is that correct?

A. Yes, sir.

[fol. 27] Q. How many men were there?

A. There were three or four others.

Q. Two of them were OPA investigators, is that right?

A. Three.

Q. Three?

A. Three, yes, sir.

Q. And two were members of the Police Department?

A. One other and myself.

Q. And the other was Detective Colby?

A. Colby, yes, sir.

Q. Now when you arrived at 720 Southern Boulevard I suppose you came up in your automobile?

A. Yes, I did.

Q. Who was in your car?

A. Colby and I.

Q. And did the other agents come in another car?

A. Two other cars.

Q. In other words, there were three automobiles?

A. Three cars there, yes, sir.

Q. Containing five men?

A. Yes, sir.

Q. What time did you arrive at the defendant's place of business?

A. Oh, I would say it was around 11 o'clock or so.

Q. In the morning?

A. Yes, sir.

Q. And when you arrived there did you go right to the gas station?

A. No, sir, I didn't.

Q. Well, where did you go?

A. I stayed opposite, parked across the street looking at the activities inside.

Q. Was Agent Colby with you?

A. Detective Colby, yes.

Q. And the other men, those three inspectors of the OPA, where were they?

A. Well, two of them were in one car and Sussman was standing on the sidewalk talking to them.

Q. Sussman is also an OPA investigator?

A. Yes, sir, he is.

[fol. 28] Q. And were they near the gas station or across the street where you were?

A. Parked across the street.

Q. Well, after they finished their conversation who, if anybody, walked across to the gas station or drove across, perhaps?

A. Drove across.

Q. Yes. Who did that?

A. Well, Sussman drove in first. Then he come out.

Q. Was anybody with Sussman?

A. No, he was alone.

Q. And what time was that that he drove in?

A. Oh, I would say it was a little before 12.

Q. Well, would it be fair to say then that you got there around 11, and a little before 12 Sussman went into the gas station?

A. Yes, sir.

Q. Could you observe Sussman from where you were?

A. No. I had left the car and had walked down and watched him as he got to the gas station.

Q. Where did you go?

A. I walked to the opposite side of the street, the same side the car was parked on.

Q. Right opposite the gas station?

A. Right opposite the auto laundry.

Q. Well, there is also a gas station there?

A. Well, the gas pumps are about 50 feet inside the door. The building runs from Southern Boulevard to Buckner Boulevard, and looking from Southern Boulevard, from the west side of the street you can see through the building, the door being open on the opposite side. You can see right through the building, and I observed the gray car of Sussman's at the gasoline pump, the first one as he entered.

Q. You saw Sussman drive in his automobile to one of the pumps?

A. The nearest pump.

Q. And the pump was inside, was it not?

A. Inside the building. It is about 50 feet in from the sidewalk entrance.

[fol. 29] Q. Yes, and how far away were you from this car?

A. I was the width of Southern Boulevard at that spot, which is at least 75 feet.

Q. Well, you were too far away to hear anything, is that right?

A. I heard nothing, no, sir.

Q. Did you see anybody give Sussman gas?

A. I saw the hose being inserted in the rear of the car but whether he got gas or not I couldn't tell from where I was.

Q. Did you see the colored girl who inserted the hose in the rear of the car?

A. I did.

Q. And you saw her turn the pump, I suppose?

A. Well no, she did not turn the pump. She just stood there with the hose in her hand.

Q. The gas was inserted in the tank?

A. The hose was inserted in the tank.

Q. All right, the hose was inserted in the tank.

A. Yes, sir.

Q. In the car of Sussman?

A. Yes, sir.

Q. How long was he there before he returned across the street with his car?

A. I would say within five minutes.

Q. Would you say it was about 12 o'clock then?

A. It was going on to 12 o'clock.

Q. After Sussman came back did he talk to you?
A. He did.
Q. Whom else did he talk to?
A. To Pearman and Tarter and Colby.
Q. After those talks with those men what happened?
A. Then Pearman was given a $5 bill.
Q. He drove across?
A. And he drove across.
Q. And did you watch him?
A. And I observed him go in. He had a black Pontiac and he went in, stopped at the pump and got out of the car, had a conversation with the girl; the pump—the hose was [fol. 30] entered into the rear of the car and after several minutes he got in the car and I saw the car drive out the opposite way.
Q. And did Pearman drive across the street from where you were?
A. No, sir. He drove out the opposite way, out on to Buckner Boulevard. Then he came back to us from a northerly direction. That is around 160-some-odd Street.
Q. Did you talk to Pearman?
A. I did.
Q. Was there more conversation between you and Pearman and perhaps Sussman?
A. No. It was the same type of conversation in regards to what he did there and how much he charged him.
Q. How long did that take?
A. Oh, I should say that was another 15 or 20 minutes.
Q. Then what happened after that?
A. Well, then we talked it over for a while and Sussman had said that he thought he saw this fellow Davis leave, being that the information was that Davis had a Cadillac, and Sussman said that when he went in some fellow pulled out with a Cadillac and the Cadillac wasn't there now. So they wasn't going to hit the place until the Cadillac come back.

So after waiting a little while they decided to go in. So then——

Q. In other words, after waiting across the street for a certain length of time all of you decided to go across the street into the premises of the defendant?
A. That's right.
Q. And when you decided to do that would you say it was about 1.30?

A. Well, I would say it was around one o'clock or so.

Q. Would it refresh your memory if I told you that your affidavit says you got across the street about 1.30; in other [fol. 31] words, you got into the premises of this defendant about 1.30 p. m.?

A. It would be right then.

Q. And when you got there with these other men the defendant Davis was not yet there, is that right?

A. That is right.

Q. Did you approach Vivian Steele first?

A. In company with Sussman.

Q. Did you speak to her first?

A. I did.

Q. Did you ask her for the $5 which she got from Sussman?

A. I showed her the shield; told her we were detectives and that this man was a Federal agent, and I asked her for the money that she had received for the sale of gas that morning. She had it in her top pocket here (indicating) and she took it out.

Q. Did she give it to you?

A. No. As she took it out Sussman took it out of her hand.

Q. Did you take anything else out besides the $5 bill?

A. Not at that time.

Q. Well, did she take anything else out at any time after that?

A. Yes. She took out a card indicating the amounts of gasoline sold by her and the prices charged.

Q. And when she did that you and Sussman were there talking to her?

A. Yes, sir.

Q. Where were the other agents?

A. Well, they were—oh, within, I would say, 25 feet of us.

Q. Well, they weren't near Miss Steele; just you and Sussman were talking to Miss Steele, is that correct?

A. Yes, and Tarter was about—the closest one I guess was Mr. Tarter.

Q. That is the gentleman sitting here (indicating)?

A. Yes.

Q. What did you do with the piece of paper you say she took out of her pocket which is supposed to have on it the [fol. 32] number of gallons of gasoline she sold and how much was charged for it?

A. I didn't take it. Sussman had it. What he did with it I don't know.

Q. In other words, you saw Sussman take it?

A. Yes, sir.

Q. What happened after that, Mr. Fitzpatrick? You got the $5 bill back——

A. We got the two $5 bills.

Q. Two $5 bills?

A. Yes.

Q. What happened after that?

A. And the card with that, and we were still talking with her.

Q. Talking to her?

A. Talking to her. About who was the boss; who told her to charge the amount, and to who she was to give the gas.

Q. Tell us how you asked her those questions.

The Court: Now just a minute, counsellor. You will be some time with the examination of this witness, will you not?

Mr. Spieler: Yes.

The Court: All right. Then be back at two o'clock. We will suspend now.

(Recess to 2.00 p. m.)

Afternoon Session

The Court: Now, counsel, I think we had better form an estimate as to how much time you will take on the preliminary investigation as to the evidence so that I can make some disposition of the jurors. I do not want to have them waiting around.

[fol. 33] Mr. Spieler: Well, with this witness I should be through in 15 minutes.

The Court: And how many other witnesses do you have?

Mr. Hartfield: Well, I should be guided by your Honor's feeling on the subject. All my witnesses tell practically the same story and the same evidence would be adduced on the trial, so I would probably be putting one more on, if your Honor would be content with that.

The Court: Well, you regulate that yourself. I won't ask the defendant to stipulate as to what they will testify to.

Mr. Hartfield: No.

The Court: You will just call them, have them tell their story and counsel for the defense may cross examine them, of course.

Well, how long will that be?

Mr. Hartfield: I will say that I will put on one more witness in the pre-trial hearing. I should say my direct ought to take 15 minutes and Mr. Spieler's cross ten. Certainly by a quarter of three the jury, I think, should be ready—that is, if I am not over-estimating your time.

The Court: What do you intend to offer, Mr. Spieler?

Mr. Spieler: Just put the defendant on to tell his side of the story, that's all.

The Court: I see. Well, I think you had better call all your witnesses on it.

Mr. Hartfield: You do, your Honor?

[fol. 34] The Court: Yes. Now if you do that will you be at it all afternoon?

Mr. Hartfield: I would think pretty well nearly all afternoon.

The Court: Well, if that is the case I don't want the jurors just sitting around in there, you know.

Mr. Hartfield: Well of course this might be a suggestion which your Honor might like: Since the great bulk of this trial will be exactly the evidence adduced in the pre-trial, why not go on with the trial and have your Honor take cognizance of this motion after I finish with all these four witnesses?

The Court: Yes, I know, and have the jury hear it, you mean?

Mr. Hartfield: It is going to be repeated again, the same story.

The Court: I know, but suppose I should decide that the evidence ought to be suppressed and the jurors have heard it—what then?

Mr. Hartfield: Your Honor, if the evidence on the first count is going to be suppressed I would certainly have to move to dismiss the first count.

The Court: I know, but then it would be a question of the jurors having heard that evidence.

Mr. Hartfield: All right, your Honor. I just tried to time.

Court: Why don't you dismiss the first count and go on the other one?

Mr. Hartfield: Your Honor, the first count is the most important count.

The Court: All right. Bring the jurors in. I intend to excuse them until tomorrow morning.

[fol. 35] (The jury came into the courtroom.)

The Court: Now jurors, you do not need to take your seats. Just come in so that I can give you a message.

Jurors, there are certain preliminary matters to be considered in this case, and the time estimate which I have obtained from counsel indicates that it will occupy the greater part of the afternoon. I know that many of you have your business to attend to. I don't want you just waiting in the jury room until four o'clock and then we would have only have half an hour or so of testimony. I think it will be better to excuse you until tomorrow morning and have you come here at 10.30 o'clock, and then all these preliminary steps will have been disposed of. We will then be ready to go on with the case.

Now follow the admonition I gave you when you left for lunch. Do not discuss the case with anybody, not even among yourselves, and of course do not permit anybody to talk to you about the case.

You will be excused now until 10.30 tomorrow morning.

(The jury left the courtroom.)

Mr. Hartfield: Will you call Mr. Fitzpatrick from the outside.

[fol. 36] Cyril G. Fitzpatrick, resumed the stand.

Cross-examination.

By Mr. Spieler (Continued):

Q. Mr. Fitzpatrick, I think the last question was, before the adjournment, you asked Miss Steele questions after you identified yourself, is that correct?

A. Yes, sir, I did.

Q. Sussman was alongside of you then?

A. Yes, he was.

Q. And the other three men were somewheres——

The Court: Any of these people here prospective witnesses?

(No response.)

A. No, neither one.

Mr. Spieler: They are just agents but not witnesses. Agents of the OPA.

The Court: All right, go ahead.

Q. The other three men were somewhere nearby but not within hearing, is that correct?

A. The only one that would have been within hearing would have been Tarter.

Q. Now that was about 12.30, wasn't it, Mr. Fitzpatrick?

A. No.

Q. When you were talking to Miss Steele?

A. No, I would say about 1.30.

Q. Well, it was then 1.30?

A. 1.30, yes.

Q. You asked her why she sold the gas without coupons?

A. No. I asked her if she had sold the gas——

Q. And she said she did?

A. —to these two men, indicating Pearman and Sussman.

[fol. 37] Q. And she said she did?

A. She said she had.

Q. And did they——

A. And then I asked her for the money and she gave me the money—at least she took the money from her pocket. As she handed it to me Sussman took it out of her hand.

Q. And the little——

A. And the small card indicating the amount of money collected.

Q. Did you tell her who Sussman and Pearman were?

A. I did.

Q. You identified them to her?

A. As Federal agents, yes, sir.

Q. Now after that conversation you had with Miss Steele what did you all do?

A. Well, Sussman went with Davis back to the Cadillac car.

Q. What time did Davis arrive—after you got finished with Miss Steele?

A. Yes. I would say Davis arrived there just before two. I would say maybe ten minutes to two.

Q. How long after the conversation with Miss Steele did Davis arrive?

A. I would say 15 or 20 minutes, within a half hour.

Q. And she said "There goes Mr. Davis"?

A. No. She said "There is Davis" when his car pulled in.

Q. And after Davis's car pulled in tell us what happened.

A. Sussman spoke and said that that was the Cadillac, see, and then he said to her, "Is that Davis?". And she said "Yes."

Davis got out of the car and he was talking to a customer, I believe, at the other end of the garage which was about 50 or 60 feet away from that, and after a short conversation with that man he then approached us. He walked towards [fol. 38] us and as he got about 15 feet away from us I said to Vivian "Is this Davis?" She said, "Yes." By that time Davis got to us. I asked Davis if his name was Jack Davis and did he run the place. He said he did. Then Sussman spoke to him.

Q. Did you hear what Sussman said to him?

A. Yes. He asked him if he ran the place, asking the same thing I asked him. Asked him for his identification and who he was and asked him if that was his car, and then said that this girl had been selling gasoline over the ceiling and "She says that you said it was all right to do it."

Q. Just a minute, Mr. Fitzpatrick. Was she present——

A. She was.

Q. ——when you told that to Mr. Davis?

A. Right.

Q. In other words, you confronted him, the defendant, with Miss Vivian Steele?

A. Yes, sir.

Q. What happened after Miss Steele said, as you just testified, that she sold this gas without coupons and charged above the ceiling?

A. Well, then Sussman and Davis went back to the Cadillac car to look it over. Then they come back to where we were standing.

Q. Do you recall signing an affidavit in connection with this motion to suppress evidence?

A. I do.

Q. I think the date is November 27, 1944 (examining); November 27, 1944, you signed an affidavit wherein you state, Mr. Fitzpatrick, that you were present at this defendant's place of business, and then you go on to describe more

or less what took place there. Do you remember that affidavit?

A. I remember signing an affidavit. The date I don't remember.

Q. Well, I show you your affidavit (handing to witness).

[fol. 39] The Court: Hand up the original.

Have you got the original here?

Mr. Spieler: I think this is a duplicate original.

Mr. Hartfield: A duplicate original.

The Court: There wouldn't be a duplicate original, would there?

Mr. Spieler: He has his signature on there.

Mr. Hartfield: A conformed copy.

The Court: Well, here is the original. Hand it up.

(Mr. Spieler hands to the witness.)

The Court: What do you want him to do?

Q. I just would like you to look at it, Mr. Fitzpatrick, and tell us whether in that affidavit you mentioned anything about confronting this defendant with Miss Steele?

A. There is a lot of things in the affidavit, Mr. Attorney, that we did not put in at all—a lot of things that are not in the affidavit that actually took place.

Q. Then would it be fair to say that you did not put in this affidavit that you confronted——

The Court: Let him look at it first.

(To witness:) Read the affidavit and see if there is anything in there about that, about the defendant being present while you asked Miss Steele these questions?

The Witness: (After examining.) No, it is not in this affidavit.

[fol. 40] Q. And after, as you say, you confronted this defendant with Miss Steele, will you tell us about what time that was, Mr. Fitzpatrick?

A. I would say it was around two o'clock.

Q. What did you do after that?

A. Well, we then went into a waiting room with Davis—Sussman, Davis and myself. This waiting room was adjacent to an office occupied by Mr. Davis of which the outer door was locked.

Q. This outer door which was locked, is that the door which leads into a private office?

A. Yes, sir.

Q. When you reached that outer door, which you say was locked, tell us what you did.

A. Well, I was seated on a settee to the right of the entrance, the door, and in conversation with Davis.

Q. Who was present?

A. Sussman, Davis and myself.

Q. Where were the other three agents?

A. Tarter was checking the gas with Vivian Steele, and Pearman and Colby were outside. What they were doing is unknown to me.

Q. Tell us what conversation took place in this anteroom. I suppose it was a waiting room, is that right?

A. Waiting room, yes, sir, for those waiting for the cars to be washed.

Q. Tell us what conversation took place there in the presence of this defendant.

A. I spoke to Davis in which I explained to him that they had already bagged the girl, that is, Vivian Steele, for selling gasoline over the ceiling; "she was in the can," I said, "and have you got any more stuff in the place? You might as well give it to them because you're in trouble anyway."

He said he did not have any more there but he wanted time to think, so he sat down there and the conversation drifted back and forth in regards the amount of stuff that [fol. 41] he had, where he got it from, how much he had there, how much tire business he did, his relation to the fellow by the name of Payne who was also employed there. He said that was his partner, and that they were in the tire business together. Then the conversation went into tires, the amount of tires allotted to him and——

Q. Maybe I can save you time, Mr. Fitzpatrick. Was there anything said about your desire to get into that office which was locked and which could not be opened unless you had a key?

A. Well, you wanted the conversation while in there. If you confine it just as regards the office, I told Davis that they had sufficient on him to look the place over. He said they didn't have any right to look it over. I said "You are already locked up. You are under arrest and so is the girl. They have a perfect right to look the place over. They are Federal agents and any stuff that you have in regards to this ration currency is their property and you

are only custodian of it during the time that it goes through your hands."

Q. Did Sussman hear that?

A. Yes, sir.

Q. And how long did this—I am not trying to be facetious—lecture on the law occur? You gave him a lecture on the law.

A. It went on for almost an hour, I would say from three-quarters to an hour.

Q. And your idea was, I suppose, to convince him that he ought to open that door and leave you into the office?

A. Yes, it was. I spoke to him about it. I told him that they were going to get the stuff anyway, and I even related to him that there was a beef on, that there was a complaint on him, an anonymous complaint that he had been selling gas over a period of time, and I also told him that these fellows had the place under observation, and I thought the [fol. 42] best thing for him to do was for him to hand up the stuff, whatever he had.

Q. What stuff were you referring to?

A. I was referring to the amount of gasoline coupons for the amount of gasoline he was missing, which was then about 1500 gallons in the end.

Q. Well, you told us a few moments ago that while you and Sussman were in this anteroom questioning the defendant Davis and talking to him generally, Agent Pearman was out taking the measurement to see whether or not there was any shortage. How did you know what he was short at that time?

A. No, sir, I didn't.

Q. Well, maybe I am mistaken.

A. I stated that Agent Tarter was out making the check, that he had received the measuring stick and that on two occasions I went out to Tarter and asked him what the shortage was. At one time Tarter said it was over 500. The next time I went out to him it was over 1100. I then conveyed that information to Davis. Davis says to me, "What am I short?" I says, "1100 so far." He says, "I have enough to cover that."

"Well, where are they?"

He didn't answer me. I then said, "If you have the stuff why don't you give it to me?"

By the Court:

Q. What do you mean they were short? What record did you have to determine that they were short?

A. He has—Davis has a capacity of 2200 gallons. That is the capacity of the gas pumps, at which time Agent Tarter had sufficient amount of currency, ration currency to cover part of it.

[fol. 43] Q. You mean stamps, regular stamps?

A. Stamps that were taken out of these two tin boxes, and also on the first count out of these two ten boxes, and after he had measured the tank and determined the amount left in the tanks and the amount of gas coupons on hand, the amount was then short about 1500 gallons.

Q. In other words, they found enough coupons to cover the amount of gas that could still be put into the tank to bring it up to capacity?

A. Well, what Tarter had in his possession——

Q. Less the sum of 1100 gallons; in other words, the tanks had a certain capacity, is that right?

A. Yes, sir.

Q. And there was a certain amount of gas in them?

A. Yes, sir.

Q. Now for the difference between the capacity and the gas in the tank you expected to find coupons in those boxes?

A. Yes, sir, for the whole amount of gas up to capacity less what was in the tanks.

Q. Yes, and when you examined those boxes at the pump you found a certain amount of coupons and some IOU's from customers, is that right?

A. Yes, sir, that is right.

Q. And adding those—adding all of them and subtracting the total from the unfilled space of the tank you figured that a certain amount of gas had been in the tanks when they were full, had been disposed of and that you hadn't been able to find the coupons for them in these boxes at the pump?

A. Yes, sir, that is right.

Q. That is what you mean by saying the operator was short a certain amount of coupons?

A. Yes, sir.

The Court: Is that the fact?

Mr. Hartfield: That is exactly the fact, your Honor.

[fol. 44] The Court: I didn't know.
Mr. Hartfield: Yes, sir.

Q. So you were inquiring for the extra coupons?
A. Yes, sir.
Q. That would take care of this difference?
A. This shortage.
Q. The alleged shortage?
A. Yes, sir.

Mr. Hartfield: For the record, if Mr. Spieler does not object, I would like to ask Mr. Fitzpatrick why there should be the same number of coupons on hand as would represent the difference between the gas in the tank and the tank's capacity?

Mr. Spieler: I haven't any objection. You can answer that.

The Witness: At the beginning of the ration to dealers, each dealer was given the capacity of his tanks in an allotment of stamps, when they have any inventory, and that gas on hand—but each dealer started off with a full capacity of 2200 gallons. After his being in business a length of time he was allowed this shortage, a period of six months would elapse. He would then be allowed to make an application for any shortage whereby there was leakage or where the amount of gasoline sold went into tanks. He was then allowed to apply to the OPA local board and receive the difference. So that at all times the dealer should have within his sale and control the full capacity of his tanks, which would have been 2200 gallons.

[fol. 45] Q. All right. Suppose the tanks are empty. In order to get the gasoline to fill the tanks must he turn in coupons from customers for the amount that was in the tanks and had been sold?

A. Yes, sir. He must state his inventory shortage, which would be determined anywheres from one month to six months, whatever time he applied for.

Q. But he would get coupons from customers who bought the gas?

A. Yes, sir.

Q. And in order to replenish his tanks he would have to turn those coupons in, is that right?

A. Yes, sir, he would.

Q. Now suppose he had only 1800 gallons of coupons, or coupons for 1800 gallons I should say, and the capacity of his tank was 2200 gallons, was he limited to new gas in the amount of 1800 gallons?

A. Yes, he was.

Q. Now did they ever take an inventory, strike a balance on this?

A. Yes. They allow him a percentage of shrinkage and leakage. It is a half a per cent over a period of time, so that they figure out that an ordinary tank in three months or in six months loses about 60 gallons of gas. That would be a safe inventory to apply for.

Mr. Hartfield: Half of one per cent for how long, do you know, Mr. Fitzpatrick?

The Witness: A period of six months.

Mr. Hartfield: That is, the shortage allowed is one-half of one per cent.

Q. In a period of six months?

A. That is the usual shortage.

Q. Well, one per cent of 2200 gallons in the tanks would be 22 gallons and a half a per cent would only be 11 gallons.

A. A month.

[fol. 46] Q. A month?

A. In six months he would be allowed about 60 gallons. That would be a safe inventory to apply for.

Mr. Hartfield: I thought you said it was one-half of one per cent every six months?

The Witness: No.

The Court: No, he says——

Mr. Hartfield: Every month?

The Witness: Yes, and he can apply for it from three to six months.

Q. All right.

A. (Continuing) But a safe inventory application would be for about 60 gallons per tank. A tank holds 550.

Q. So then, as I understand it, if a customer went to the office of the man who was selling gas at retail from these gas pumps, the manner in which he would make the check would be to determine the capacity of a tank, and then to determine with a proper measuring stick the amount of gas in the tank; then to ask that he be shown coupons for

the difference, the difference between the total capacity and the amount of the gas in the pump, is that right?

A. Yes. Each measuring stick for different tanks supplied by different companies has a certain measuring to it. Some are measured in inches, some are measured in feet, into lengths, and with that comes a chart. All gas stations in addition to the amount of capacity, they have a chart on their walls showing what the oil company stick is, what its value is.

The Court: All right, go ahead. I think I understand the situation now.

[fol. 47] By Mr. Spieler:

Q. After talking to Davis in the presence of Sussman, except when you just said you went out from time to time to verify from one of the other agents whether or not there was a shortage, you tried to persuade Davis to open the door with this key which would lead you into that private office?

A. Yes, that is right. During that time he hadn't received the keys yet. He told me he didn't have the keys.

Q. Do you know how these little boxes were opened up?

A. By Davis with a key.

Q. And did you see him do it?

A. Well, I saw him approach the boxes, and I saw the boxes the next time the cover was open.

Q. Did you see what he did with those keys after he opened the tin boxes?

A. No, sir, I did not.

The Court: What tin boxes—where?

Mr. Spieler: Over the gas pumps there are little tin boxes where the coupons are deposited when customers buy gas.

The Court: All right.

Q. And you say you do not know what Davis did with the keys which he used to open those tin boxes?

A. No, sir, I do not.

Q. Before you went into this waiting room did you search Davis?

A. No, sir, I did not.

Q. Did you see any other agent search him?

A. No, sir, I did not.

Q. Would you say you were in this waiting room approximately two and one-half hours trying to persuade [fol. 48] Davis to open that door leading into the private office?

A. I would say I was in there about an hour with him before he opened the door.

Q. About an hour?

A. Yes, three-quarters to an hour.

Q. At no time was Agent Colby in that anteroom or waiting room?

A. No, sir. He had come in and went out, but he did not remain therein until after the door had been opened.

Q. Did Agent Colby at one time use a flashlight looking into the window and trying to force the window open?

A. I observed Agent Colby through the glass panel door of the private office, and so did Davis observe it. Colby had a flashlight in his hand shining it in through the window and Davis then said to me, "He don't need to do that. I will open the damned door" and he got up and he opened it with the key.

Q. Did Colby try to force the window open which would allow him to get into that private office?

A. Where I was sitting I couldn't tell you whether he tried to force it or not.

Q. Well, would you say he tried to open the window and get into the private office through the window?

A. That would be my impression from where I was sitting.

Q. Did anybody in your hearing threaten to break down this door unless it was opened by Davis?

A. No, sir.

Q. Now after about one hour, as you have just told us, you saw Davis get the keys and open the door which led into the private office?

A. Yes, sir, I did.

Q. Where did he get the keys from?

A. He got them from Agent Pearman.

Q. Do you know where Agent Pearman got them from?

A. He came from the other end of the building, the Buckner Street side—the Buckner Boulevard side.

[fol. 49] Q. Did you hear Davis say to anybody that Agent Pearman had the keys?

A. No, sir, I did not.

Q. Did you hear Davis say to anybody that a man by the name of Payne had the keys?

A. No, I heard Sussman tell that to Pearman.

Q. Did you hear Davis tell that to Sussman?

A. No, sir, I did not.

Q. Well, you have no doubt in your mind, then, that Davis did not have the keys in his pocket?

Mr. Hartfield: I object to the form of the question.

Q. Well, Davis did not have the keys while he was sitting in the waiting room with you and Sussman?

A. No, he did not. He told me he did not have the keys to the office.

Q. Well, you saw the keys handed over——

A. Yes, sir, I did——

Q. —by Agent Pearman?

A. Yes, sir.

Q. As you say, to Davis?

A. Yes, sir, that's right.

Q. About an hour after you were in that office or that anteroom?

A. Yes, about an hour.

Q. Who opened the door which led into the private office?

A. Davis did himself.

Q. In the presence of Sussman and yourself?

A. Yes, sir.

Q. What happened after you all got into the office?

A. Well, Davis went into the office first and proceeded to a metal file or metal cabinet, which was about ten feet into the office. He had his back turned to me, and the next I saw him when he turned around he had a folder in his hand, a manila folder from which he took a while envelope [fol. 50] and handed it to Sussman.

Then he took another one. Then I saw him give him about four of them, of which Sussman opened them, looked in and placed them down in front of him. I in the meantime had turned to my right where there was a low desk and took from the top of it a quantity of tire rationing certificates.

The Court: You mean they were on top of the desk or in a drawer?

The Witness: No, they were right on top of the desk, in open view, and under them, to the right of them, was bingo sheets with gasoline ration stamps pasted thereon.

Q. Did you make a list of all those different items?

A. No, sir, I didn't.

Q. Did you see Sussman make a list of that?

A. Not at that time, no, sir.

Q. And did you tell us—you already told us that before this door was opened you told Davis that he was under arrest?

A. Yes, he had been told that several times.

Q. And you also told Miss Steele that she was under arrest?

A. I told her that she was in the can.

Q. You told that to whom?

A. To Miss Steele.

Q. You told that to her?

A. Yes, I told that to Davis too.

Q. I suppose they knew what you meant by that?

A. She did.

The Court: What does that mean?

The Witness: She was under arrest.

[fol. 51] Q. She is practically in jail—that is what it means, I think.

A. An expression, yes.

Q. A colloquialism.

Now, Mr. Fitzpatrick, after those papers were taken out of the safe by Davis, as you have just told us, and after you found this manila envelope on Davis's desk——

A. Correction, please. I didn't find any manila envelope on Davis's desk.

Q. Well, you found something on the desk?

A. I found a quantity of tire rationing replenishment certificates.

Q. Those were on the desk?

A. They were on top of the desk.

Q. In full view?

A. Yes, sir.

The Court: Were they stamps which you found on the desk?

The Witness: No, sir. They are tire rationing replenishment certificates whereby if you, as a tire dealer, sell a tire to a certain person you are then allowed to replace that tire by putting in a replenishment certificate, on a tire manufacturer who will then give you a tire back for the one you sold.

Q. Can you identify what papers were taken out of that private office, if you saw them?

A. Yes, I could.

Mr. Spieler: Have you them here, Mr. Hartfield?

Mr. Hartfield: I do.

Mr. Spieler: May I have them?

Mr. Hartfield: No, you may not. I haven't offered them in evidence and I don't intend to show them to you.

[fol. 52] Mr. Spieler: Well, I will withdraw that question for the time being.

The Court: No, but if you want them I will direct him to turn them over to you.

Mr. Hartfield: Certainly, your Honor.

Q. Mr. Fitzpatrick, did you place your initials on any of those papers which were taken out of that private safe?

A. I did not.

Q. Did you see anybody place any initials on those papers?

A. No, sir, not in my presence.

Q. Did you ask Davis to initial them?

A. No.

The Court: What is it you want to know?

Mr. Spieler: I want to know exactly what they took out of that office.

The Court: I know, but this witness says there were certain tire rationing replenishment certificates. Do you want those?

Mr. Spieler: I don't care for those.

The Court: All right. Then he said also he found on top of a desk certain of these bingo sheets, that is, sheets on which used gasoline ration stamps had been pasted—is that right?

The Witness: Yes, sir.

The Court: You want those, do you?

Mr. Spieler: Yes, your Honor.

The Court: All right. Turn them over to counsel for his use in the course of the cross examination of this witness.

How many sheets are there?

Mr. Hartfield: Your Honor, in pursuance to your direc-

[fol. 53] tion I am turning these over. I would like to ask Mr. Spieler whether he wants any more sheets that were turned over other than I intend to introduce at the trial.

Mr. Spieler: No. If you don't intend to introduce them at the trial I do not want them. I only want those which you intend to introduce.

Mr. Hartfield: These are the ones which I intend to introduce. (Handing to Mr. Spieler.)

The Court: All right, as having been found by this witness on the top of the desk.

Mr. Hartfield: I don't know which is which in that respect, your Honor.

Mr. Spieler: Well, outside of these tire rationing coupons, which I am not interested in, anything else that was found there and which the Government has just stated they intend to offer in evidence. If they do not intend to offer anything in evidence I don't care what they look like. I don't even want to see them.

The Court: Now, counsellor, I do care because I want this record to be straight. I don't know what may develop during the trial itself when the jury is present. While this witness is on the stand you may question him about anything that he saw there in the way of ration stamps or anything else.

He has told us about these bingo sheets and they have been turned over to you. You have them now in your hand.

Mr. Spieler: That is right.

The Court: All right. He says that he saw the defendant take out of a steel cabinet a manila folder, and from the [fol. 54] manila folder remove some white envelopes which the defendant turned over to Mr. Sussman.

Now do you intend to call Sussman?

Mr. Hartfield: I certainly do.

Mr. Spieler: All right.

The Court: All right. Then why not wait until Sussman comes on for the white envelopes and just take up with this witness these bingo sheets?

Are these the bingo sheets in question?

Mr. Hartfield: I will have to ask the witness, your Honor. I am not so sure.

The Court: All right, hand them to the witness.

Q. Mr. Fitzpatrick, I show you some papers which you referred to as bingo sheets (handing to witness).

Are those the ones which you saw this defendant take out of the steel cabinet and turn over to Sussman?

A. These were turned over to Sussman by Mr. Davis.

Q. And are those the ones that he took out of the steel cabinet?

A. Yes, sir. They are not the ones that I had.

The Court: They were not the bingo sheets that you found on top of the desk?

The Witness: No, sir, they are not.

The Court: Where are they? If you have any more of them hand them up.

The Witness: If the Court pleases, I can tell what happened to them.

The Court: Yes, what happened to them.

The Witness: Those bingo sheets that I took away from Davis was returned to him by——

[fol. 55] Mr. Hartfield: By Mr. Burchill.

The Witness: —by the United States Attorney Burchill when he was in the Office of Price Administration. He was to make out a bill for 900 gallons. It was the bingo sheets which I took from his desk.

Q. In other words, Mr. Fitzpatrick, which you took from the defendant's desk were eventually turned over to Mr. Burchill of the OPA, who thereafter gave them back to the defendant?

A. Yes, sir, upon a receipt by Davis.

Q. That is right. In other words, Davis gave Burchill a receipt for those bingo sheets?

A. Yes, sir, he did.

Mr. Hartfield: Do you want that (indicating)?

Mr. Spieler: We will come to that later. We do not need it now.

Mr. Hartfield: All right.

The Court: Well, you turned these bingo sheets over to Burchill?

The Witness: Yes, sir, I did.

The Court: When?

The Witness: At the time we brought Davis down, which was the 20th of June, around 5 or 5:15 in the afternoon. Those were the sheets when I picked them up. I asked Davis where they came from and he said they were taken in by him in the course of business.

Q. Now were these the sheets which came out of that steel cabinet?

A. No, sir, they were not.

Q. Those were the ones that you found on Davis's desk?

A. Yes, sir, on top of the desk.

[fol. 56] The Court: Yes. He said that several times, counsellor.

Q. Do you know which ones came out of the steel cabinet? I show you these bingo sheets again and ask you whether these are the ones which came out of the steel cabinet (handing to witness)?

A. These comes out of another folder, a manila folder which Davis had taken out of the steel cabinet and handed to Sussman. It was not the same folder containing the white oblong or long envelopes.

Q. But nevertheless they came out of the steel cabinet?

A. Yes, sir. I didn't see them until Davis gave them to Sussman.

Mr. Spieler: May we have this marked for identification?

A. (Continuing) My attention was drawn to them.

The Court: You may have them marked for identification.

Mr. Spieler: Yes.

(Marked Defendant's Exhibit A for identification.)

The Court: How many sheets are there (examining)? Seven bingo sheets, is that right?

Mr. Spieler: Yes.

The Court: I understand from your testimony, Mr. Witness, that these sheets came from a second manila folder?

[fol. 57] The Witness: Yes, sir.

The Court: Not the same manila folder from which certain white envelopes had been taken——

The Witness: No, sir.

The Court: —and given by Davis to Sussman, but from a second manila folder, and the seven bingo sheets having been thus taken from that second manila folder were turned over to Mr. Sussman by Davis, is that right?

The Witness: Yes, sir, that is right.

Mr. Hartfield: Your Honor, for the purpose of the record are you making my exhibits as a defendant's or a Government's exhibit for identification?

The Court: I am marking these for identification.

Mr. Hartfield: In whose behalf?

The Court: At the request of the defendant.
Mr. Hartfield: All right.

Q. Now, Mr. Fitzpatrick, I show you seven pieces of paper and ask you to tell us if you ever saw them before (handing to witness)?

The Court: Well, you showed them to him in a white envelope, is that right?
Mr. Spieler: Well, the white envelope is the United States Attorney's envelope.

A. That is not the white envelope they were contained in on the day of June 20th.
Q. Did you see those papers on June 20th?

The Court: These sheets.

[fol. 58] A. Yes, sir, I did.
Q. Will you tell us where they came from?
A. They came from a white envelope similar to this in size (indicating), and they were given by Davis to Sussman after he had taken them out of a steel cabinet. Sussman then turned——

The Court: How many of these are there?
The Witness: (After examining) Seven of them.
The Court: Also seven?
The Witness: Yes, sir.
The Court: And these are sheets of coupons, is that right?
Mr. Spieler: Yes.
The Witness: These are sheets of coupons, 10, 11 and 12.

Q. And they are loose?
A. They are loose without the tops on, designating the owners.
Q. And they are not on bingo sheets?
A. No, sir, they are not.

Mr. Spieler: May I have those marked for identification?
The Court: Yes.

(Marked Defendant's Exhibit B for Identification.)

The Court: You are just having those sheets marked?
Mr. Spieler: Yes.
[fol. 59] The Court: Not the envelope?

Mr. Spieler: Well, a little piece of paper attached to the sheets.

The Court: That is right.

Q. Was there anything else taken out of that safe besides the papers that you have just identified?

A. These numerous white envelopes each of which was marked on the front its contents therein, whether it was B's, C's or A9's, A10's or A11's. They are all marked on the front of a plain white envelope.

The Court: Were those in one envelope or separate white envelopes?

The Witness: No, sir, separate white envelopes except these were in one envelope.

The Court: One white envelope?

The Witness: Yes, sir.

The Court: Which Davis turned over to Sussman?

The Witness: Yes, sir.

Q. Was there anything else turned over?

A. The tire certificates.

Q. Outside of that anything else?

A. The quantity of gasoline on bingo sheets which I had picked up from the desk.

Q. And which were later on turned back to him by Mr. Burchill?

A. Yes, sir.

Q. Did anybody give Davis a receipt in your presence?

A. No, sir, they did not.

Q. Now after these papers were taken out of the safe——

[fol. 60] The Court: Safe?

Mr. Spieler: Safe. He calls it a safe, I think——

Q. Wasn't it?

A. Steel compartment or cabinet I call it.

The Court: All right.

Q. All right, a steel compartment. What did you do with Davis and Miss Steele?

A. Well, it went on from there, there was quite a check made then on the amount of tires in the place. I don't remember correctly. I think there were 266 and it was to be determined then what his allotment of tires were, whether he had more than his share or whether he was in the confines

of his allotment. Also there was a check back against the ration tire certificates he had. Then the men went out and counted them. That took an hour, I guess. They had to count both good and bad. There were seconds.

Q. May I interrupt you to ask this question: What time did you get to the OPA office at the Empire State Building with the defendant Davis, Miss Steele, and somebody else I think was there?

A. Yes, sir, I would say between 5.15 and 5.30.

Q. And when you got there did the other men go with you, the other agents?

A. They did.

Q. And what happened to Davis when he arrived there, do you know?

Mr. Hartfield: I object to all this, your Honor.

Q. Well, what did Davis do after he got to the OPA office?

[fol. 61] Mr. Hartfield: I still object to it.

The Court: Overruled.

A. Well, Davis was brought by me into Burchill's office, who was the enforcement attorney in charge of gasoline.

Q. And did Mr. Burchill question him in your presence?

A. He did. I told Davis that "This is Mr. Burchill, he is the enforcement attorney. He wants to ask you a few questions with regard to the way you got the stuff."

Q. Was there a stenographer present?

A. She was but she did not take anything. She was put outside.

Q. In other words, the questions asked by Mr. Burchill of the defendant Davis were not taken by a stenographer?

A. Not at that time, no, sir.

Q. And how long was Davis in the office of Mr. Burchill, to your knowledge?

A. I would say about half an hour.

Q. What did he ask Davis?

A. He asked Davis where he had got these particular stamps.

Q. You mean Defendant's Exhibits A and B for identification?

The Court: No, B—well, I don't know. Which do you mean? Those that were on the bingo sheets or the others?

The Witness: Well, they were all contained together on Burchill's desk. There was more than that with them.

Q. It was Defendant's Exhibit A for identification and Defendant's Exhibit B for identification, and the one which Burchill eventually gave him back?

A. Yes, but there was more than that. There were several more envelopes with stamps contained in them.

[fol. 62] Q. Well, at any rate, he was questioned about all the papers which you told us were on Burchill's desk?

A. Yes, sir, that is right.

Q. And what did the defendant say?

A. Well, Davis and Burchill got into an argument. Davis wouldn't answer the question but was fencing with Burchill back and forth, and Burchill got sore at him and he told him if he did not answer the question he would lock him up.

Q. Of course he was without an attorney, isn't that so?

A. He was, yes, sir.

Q. Well, did he lock him up?

A. Then Davis said he had nothing to say and he says, "All right," he turned to me, Burchill did, and he said "Lock him up."

I said to Davis, "All right, come on."

Q. Excuse me a minute, please. Was there a question asked of Davis by Mr. Burchill where he got the coupons designated here as Defendant's Exhibit B for identification?

A. Yes, sir.

Q. And will you tell us, please, what Davis told Burchill?

Mr. Hartfield: I object.

The Court: Overruled.

A. He said that somebody had left them with him.

Q. Did he say who the somebody was?

A. Not at that time, no, sir.

Q. Well, after Burchill and Davis got into some argument, as you say, did Burchill tell you to have Davis arrested?

A. Yes. He said to lock him up; and I then called Davis and I took him out.

Q. Did you take him out of Burchill's room?

A. I did.

Q. Where did you go with him?

A. I went out to the elevator on the third floor of the [fol. 63] Empire State Building to proceed to the street, and while waiting for the elevator Davis said to me, "Jesus, I can't go home to my family."

Q. What time was this?

A. Oh, this was six o'clock, or after.

Q. It was about seven, wasn't it?

A. Well, seven.

Q. What happened after he said he couldn't go home to his children?

A. I said, "Well, all they want to find out is where you got the stuff."

He said, "What do you mean?"

I said, "Where you got this stuff, and that's all they want to find out. Tell them the story," I says, "and I believe they will give you a break."

He says, "Is that right?"

I says, "Yes."

"What do you want to do?"

He says, "Come on, we will go back."

I then brought him back into Burchill's office, at which time upon arriving there I says to Burchill, "Davis has something to tell you."

Burchill says to him, "Is that right? Cut out the horse shit" I think he said to him, "and let us know what it is. I won't take any more stories from you."

So Davis then sat down and Burchill says to me—says to him, "Now where did you get this stuff?"

Q. Referring to Defendant's Exhibit B for identification (indicating)?

A. Yes, sir.

He said he got them off a fellow by the name of Tony.

The Court: Tony?

The Witness: Tony, yes, sir.

[fol. 64] A. (Continuing:) And that Tony came to his garage on several occasions, and he operated a Lincoln Zephyr, a dirty car, an old one. He said he thought it was about a '37 and he had come there on several occasions, at least he said about once a week.

Burchill then asked him if he would make arrangements to make a buy off Tony and if he did would he let us know, and he said he would. Burchill then gave him the telephone

number of the place and to call him up if this Tony came in.

Q. You mean he gave him the telephone number of the OPA office?

A. Yes, sir, with his explanation.

Q. Yes.

A. Then Davis said, "What am I going to do? I ordered a thousand gallons of gasoline for tomorrow and you have all my stuff."

Burchill said, "Well, if you live up to your agreement, here is your stuff back." He then gave him 960 gallons, I think, which Burchill counted out from the stuff that I had taken off the desk of Davis's office.

The Court: You mean coupons for that amount?

The Witness: Those bingo sheets to that amount.

The Court: Bingo sheets?

The Witness: With coupons thereon.

A. (Continuing:) For which he gave to Davis, and the girl was then called in and she was asked to make——

Q. You mean Miss Steele?

A. Oh no.

Q. Oh, the stenographer?

A. The stenographer was then called in. She was asked to make out a receipt and which Davis dictated—pardon, Burchill dictated to her a receipt for, mentioning the amount of gallons.

[fol. 65] Q. Is this the receipt, Mr. Fitzpatrick, dated June 20, 1944 (handing to witness)?

A. Yes, this is it.

Q. And Mr. Davis gave this receipt to Mr. Burchill?

A. Yes, sir, he did.

The Court: What is the date of it?

Mr. Spieler: June 20, 1944.

The Court: Davis signed the receipt and left it there, is that right?

Mr. Spieler: Yes, sir.

The Court: All right. What does it show—hand it up.

(Handed to the Court by Mr. Spieler.)

The Court: (After reading.) All right.

Q. Now, Mr. Fitzpatrick, you say that Davis told Burchill he got these coupons, Defendant's Exhibit B for identification, from a man by the name of Tony?

A. Yes, sir.

Q. Did Mr. Burchill take that down in the presence of a stenographer?

A. No, sir, he did not.

Q. Did he write out any such statement and ask Davis to sign it?

A. Not to my knowledge, no, sir.

The Court: Was there a stenographer present when Davis said that?

The Witness: No, sir, she was not.

The Court: All right.

Q. When did the stenographer come in and make out this receipt dated June 20, 1944?

[fol. 66] A. At the time that Burchill agreed to give back sufficient amount of gas to cover a delivery of a thousand gallons to Davis the following day.

Q. And that was after Davis had already told Burchill that he had gotten these tickets, Defendant's Exhibit B for identification, from a man by the name of Tony?

A. That is right.

Q. After the receipt was signed what did you do with Davis?

A. Davis went home.

Q. Who told him to go home?

A. Burchill.

Q. That was June 20, 1944?

A. That is right.

Q. When did you arrest Davis?

Mr. Hartfield: Objected to; it calls for a conclusion.

The Court: Overruled.

Q. When did you arrest Davis after this conference of June 20, 1944, in Mr. Burchill's office?

The Court: When did you take him into custody again?

The Witness: The exact date I couldn't tell without looking at the records. I arrested him on a warrant, I would say, about two or three weeks later.

Q. Well, if I should tell you it was about six weeks later would you take my word for it?

A. If it showed on the warrant as the date of arrest, yes.

Q. And you brought him into this building?

A. I did.

Q. And he was arraigned before the Commissioner?

A. He was.

[fol. 67] Q. And if you recall the complaint upon which the warrant was issued refers to Defendant's Exhibit B for identification, is that right?

A. The contents of the warrant I wouldn't be able to say without reading it.

Q. I mean the complaint.

A. The complaint and the warrant—the warrant and the complaint are the same. If I had the complaint I would be able to tell you exactly.

Q. In other words you do not remember whether the complaint referred to——

A. The specific amount and the violation, no, sir.

The Court: Well, if you have the paper hand it up.

Mr. Spieler: I haven't got the complaint here.

That is all, Mr. Fitzpatrick.

The Court: Any redirect?

Mr. Hartfield: Yes.

Redirect examination.

By Mr. Hartfield:

Q. When did you first place Mr. Davis under arrest?

A. I would say the first time he was told he was under arrest was in the garage the day of arrival there on June 20th and after he had come back from looking at the car with Sussman.

Q. Giving the widest possible maximum that you could to the estimate of time, how long after you met him was he put under arrest?

A. Oh, within the first five or ten minutes.

Q. Was that on June 20, 1944?

A. Yes, sir, it was.

Mr. Hartfield: Those are all the questions I have.

[fol. 68] Recross-examination.

By Mr. Spieler:

Q. Just one more question: What did you charge him with?

A. He was charged with over the ceiling violation of the OPA.

Q. In spite of the fact that the sale was made while he was not there?

A. He being the proprietor of the place he was charged with the violation.

Mr. Spieler: That is all.

Redirect examination.

By Mr. Hartfield:

Q. Had you heard by this time that Vivian Steele had said that he had told her to do that?

A. Yes, sir, I had.

Mr. Hartfield: That is all.

The Court: All right, step down.

(Witness excused.)

The Court: Next witness.

Mr. Hartfield: Call Agent Sussman.

JOSEPH SUSSMAN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Hartfield:

Q. What is your occupation, Mr. Sussman?

A. Special Agent attached to the Currency Protection Branch.

[fol. 69] Of what?

A. Of the Office of Price Administration.

Q. Were you so employed on June 20th of last year?

A. I was.

Q. Do you remember what you were doing on June 20th of last year?

A. I do.

Q. Will you tell us about what you did from about 12 o'clock on that day?

A. I was parked in an automobile outside the Davis Auto Laundry on Southern Boulevard in the Borough of Bronx, observing the activities of the service station and auto laundry. Around one o'clock I went in—I drove my car

into the Davis Auto Laundry, pulled up to the gas pump. A colored woman gasoline attendant asked me what I wanted and I said "gasoline." So she says "How much do you want?" And I said, "I want to fill the tank." I told her I didn't have any coupons. She said, "That's all right."

She filled the tank. I gave her a $5 bill which I had previously marked, and I got 11.8 gallons of gas for which she charged me $4.82.

Q. Do you remember the number of the $5 bill you marked?

A. No, I would have to refresh my memory from the records because I had marked two bills.

The Court: Just a minute. How many gallons did he get?

(Record read.)

Q. I show you two $5 bills and ask you whether you marked those (handing to witness)?

A. I did.

Q. Where did you mark them?

A. I have my initial in the upper reverse corner, the left-hand corner of the bill, on both bills (indicating).

[fol. 70] Q. You marked both bills?

A. I did.

Q. Do you know which one of those bills you took?

A. I would have to refresh my memory from the records.

Q. You signed an affidavit, did you not, Mr. Sussman?

A. I did.

Q. And you said in that affidavit that you gave a $5 bill marked with the serial number 96092598A, Series of 1934A?

A. It had the letter I in front of it.

Q. The number 1, capital I?

A. That is right.

Q. Does that refresh your memory?

A. Yes, it does.

Q. Is that the $5 bill?

A. That is the $5 bill.

Q. And what did you do with the $5 bill——

Mr. Hartfield: I ask that it be marked for identification.

(Marked Government's Exhibit 1 for identification.)

A. I tendered the $5 bill to Vivian Steele in payment of the gasoline, and the cost that she charged me for not having the coupons, I received 18 cents in change from her.

Q. You bought the gas at the Davis service station with that $5 bill?

A. I did.

Mr. Hartfield: I ask that it be introduced in evidence.

The Court: Well, we won't mark it but we will consider it as an exhibit.

(Government's Exhibit 1 for identification deemed marked Government's Exhibit 1 in evidence.)

[fol. 71] Q. What did you do then, Mr. Sussman?

A. After I tendered the $5 bill she took a piece of paper, a cardboard out of her left breast pocket. She wore coveralls, and she marked the price of the gasoline on it.

Q. Did you say you got charged $4.82 for it?

A. I did.

Q. I show you here a piece of cardboard and ask you if you have ever seen that before (handing to witness)?

A. I have.

Q. Was that the piece of cardboard Vivian Steele took out of her pocket?

A. It is.

Q. Is that the $4.82 there, the mark made in respect to your buying of gasoline?

A. It is. I so initialed it at the time I took it from her.

Q. Those initials are your initials?

A. Those initials are my initials.

Mr. Hartfield: I offer this as Government's Exhibit 2 in evidence.

The Court: We will mark it for identification.

Mr. Hartfield: I am sorry, your Honor.

(Marked Government's Exhibit 2 for identification.)

Q. Will you proceed and tell me what happened?

A. Well, after I had received my change Vivian Steele asked me if I was a horseman and I said "Yes." She wanted to know a good horse to play. I told her—I don't remember what answer I gave her, but I left the garage and I drove up the block and turned around and came back opposite the garage again where Agent Pearman and Tarter, Detective Fitzpatrick and Colby were parked in two separate cars.

[fol. 72] I marked another $5 bill and gave it to Agent Pearman and sent him into the garage to purchase gasoline.

Q. Did you mark the $5 bill, G32104980A (handing to witness)?

A. I did.

Q. Did you give it to Pearman?

A. I did.

Mr. Hartfield: I ask that it be marked for identification as Government's Exhibit 3.

(Marked Government's Exhibit 3 for identification.)

Q. Continue, please.

Mr. Spieler: May the defendant leave? He wants to go to the men's room, while this is going on.

The Court: No, but we will suspend for five minutes.

(Short recess.)

Mr. Hartfield: Will you read the last question, please.

Q. (Read.) (Continuing) Now would you continue and tell me what happened.

A. Pearman took the $5 bill which I had given him and drove into the garage. We were observing from across the street. I saw Vivian Steele put the hose of the gasoline pump into the car tank. A short while after Pearman came out, drove around the block and then turned around and came back to us and stated that he had purchased gasoline, and we then went into the garage, Detective Fitzpatrick, Colby, Agents Pearman, Tarter and myself, and we identi- [fol. 73] fied ourselves to Vivian Steele, and Detective Fitzpatrick and I were talking to her. I asked her for the money I had given her. She took the money from her pocket, handed it to me and checked the bills and found the two bills which I had marked. I asked her for the slip on which she had marked the price of the gasoline I had purchased. She took it from her pocket and gave it to me. We asked her if she knew she was doing wrong in selling gasoline without coupons. She stated yes. We asked her why she was doing it. She said that her boss, Jack Davis, had so instructed her, and a few minutes after that a Cadillac, a black Cadillac sedan pulled in through the rear door of the garage and Vivian Steele says, "Well, here comes Mr. Davis now."

Davis pulled in, stopped the car, got out and started to walk towards us and I walked over towards Davis. I iden-

tified myself to Davis and said "Here are my credentials." I told him he was under arrest. I asked him to look through his car. He looked through the car with me. He opened the glove compartment. He opened the back of the car. He wanted to know what the trouble was and I told him that——

The Court: Did you say he was under arrest as soon as he drove in?

The Witness: I did, and I told him that Vivian Steele sold the gasoline, that she stated she sold it on his orders.

Q. Excuse me for interrupting you but at any time did you say "Do you want us to send you a letter"?

A. I did not.

[fol. 74] Q. Did you hear anybody say . . t to him?

A. I did not.

Q. Go ahead.

A. So I walked over with Davis after going through the car, to Vivian Steele. I asked Vivian Steele in his presence whether she had sold me gasoline without coupons and what she had charged me. She repeated it. I asked her on whose instructions she had done it. She said on Mr. Davis's. So I walked toward the counter—there is a counter there, a display counter near the office—with Davis and Fitzpatrick. Agent Tarter started to check the gasoline storage tanks, check the coupons to see if they tallied as far as capacity of gasoline went. Agent Tarter asked——

The Court: Where were the coupons that he used to check? Where were they?

The Witness: Agent Tarter asked Mr. Davis where the coupons were and Davis went over to the gasoline pumps and there were little boxes of tin on to them with coupons in them. He brought these back to Agent Tarter. Agent Tarter tallied them and then checked the gas tanks and there was a shortage of approximately 1,500 gallons. I asked Davis if he had any more coupons in the place. He said no.

Then Davis walked away from the counter a few feet towards a man whom I later learned was Robert Payne and handed him something, and I nodded to Agent Pearman to follow Robert Payne, which he did. And I stood talking to Davis in the front part of this—there is a little waiting room, in front of his office, and Detective Fitzpatrick and myself were talking to Davis there and Davis wanted to

know what could be done. I said "nothing." We told him [fol. 75] that he had violated the law, and we asked him again if he had any more coupons, and when we asked that, Pearman came in and handed him the keys, a ring of keys. Pearman said "Here, they are still hot."

The office was locked. We asked Mr. Davis if we could look in the office. He hesitated a while and then he opened the office door with the keys which Agent Pearman had given him and he walked over to a metal cabinet. It looked like a safe. It is a metal filing cabinet, I believe, and took out some envelopes containing coupons and handed them to me, and I said to him then, "I thought you did not have any more coupons." He said, "I had these," and one of the envelopes contained A coupons with the name and address of the user of the coupons torn from them.

Q. Mr. Sussman, I show you Defendant's Exhibit B and ask you if these look like the coupons you found of which you are now speaking (handing to witness)?

A. These are the coupons that Mr. Davis handed to me.

Q. Continue, please.

A. I asked him where he had gotten the coupons from. First he wouldn't say anything. He wanted to talk things over, and he also handed me some gasoline forms known as bingo sheets, which are OPA forms, R-545, which had pasted on them gasoline coupons which were not valid as yet.

Q. I show you Defendant's Exhibit A for identification and ask you are these the bingo sheets on OPA Form R-549, I believe (handing to witness).

A. 545 (After examining.) They are.

[fol. 76] Q. And these you got from Davis's place?

A. Mr. Davis, yes.

Q. Continue, please.

A. And I asked Davis why he had accepted No. A11 and No. A12 gasoline coupons when they weren't valid as yet? He said, some of his customers had given them to him. I again asked him where he got the A sheets—sheets containing A10, 11 and 12, without the registered owner's name to those sheets. He could give no explanation for it.

Shortly after that we left for the Office of Price Administration at 350 Fifth Avenue. I did not ride down with Davis. I took Payne, I believe, down with me. We all met down there about 5 or 5.30.

Q. You entered the place about 1.30?

A. I went to his place at Southern Boulevard about 1.30. We arrived at the Office of Price Administration about 5 or 5.30.

Q. Did you hear Agent Tarter at any point ask Davis if he had any more coupons?

A. I did.

Q. And at what point was that?

A. That was when Agent Tarter was checking the coupons against the gasoline.

Q. That is, before you found any coupons inside?

A. That is right.

Q. And what did Davis reply to that question put to him by Tarter?

A. Davis said he did not have any more coupons in the place.

Q. Did you hear Colby have any conversation with Davis?

A. Detective Colby walked into the room, into the office, when Detective Fitzpatrick and I were there with Davis. I didn't hear any conversation.

Q. Well, you made an affidavit on the 27th of November, did you not, Mr. Sussman?

A. I did.

[fol. 77] Q. I ask you whether you remember this statement in your affidavit: "At about this time Detective Colby came into the office and inquired of the defendant Jack Davis whether he would mind if he would look around the place."

A. That is right.

Q. Did you hear that?

A. Yes, that is after we were in the office and after we had gotten the coupons from Mr. Davis.

Q. Was the only conversation you heard Colby had with Davis?

A. That is all I recall.

Q. Do you remember what Davis said in reply to that question of Colby's?

A. Davis told him to go ahead and look around.

Mr. Hartfield: That is all the questioning I have.

Cross-examination.

By Mr. Spieler:

Q. Mr. Sussman, on June 20, 1944, at about 1.30 p. m. you went to the defendant's place of business with about four other men?

A. No. I went there about 11 o'clock in the morning but I didn't enter the premises until about—between 1 and 1.30.

Q. And you had four other men with you?

A. That is right.

Q. They weren't there on the premises but they were nearby?

A. That is right.

Q. Up to that point, Mr. Sussman, you had never been at the defendant's premises before, is that correct?

A. No, I had not.

Q. And you never knew the defendant or Vivian Steele, this colored girl who was a gas station attendant?

A. I did not.

[fol. 78] Q. But yet you tell us that you came to Miss Steele and told her you want her to fill up your gas tank and told her that you did not have any gasoline coupons?

A. That's right.

Q. Wasn't this the fact, Mr. Sussman, that you got your gas tank filled and after it was filled you told her you were sorry but you forgot your coupons and left them home?

A. That is not so.

Q. Well, you got your gas and you paid for it with the marked $5 bill?

A. I did.

Q. And you say she made out some sort of slip, I think a cardboard slip, in which she put the amount of money you gave her?

A. That is right, the amount of money that she charged me for the gasoline.

Q. Did you ask her to make it out?

A. I did not.

Q. Did she put down the quantity of gasoline she sold you?

A. She did.

Mr. Spieler: May I see that, please?
Mr. Hartfield: Oh yes.

(Handed to Mr. Spieler by the clerk.)

Q. I show you Government's Exhibit 2 for identification and ask you to tell us whether this is the paper you saw Miss Steele make out after she put gas into your tank and after you paid her with the marked $5 bill (handing to witness)?

A. If you wish, yes. Here are figures she used, 11.8 gallons of gas at 20 cents per gallon which amounted to $2.36. $2.46 represents the money charged me for not having coupons.

Q. You saw her write this?

A. I did.

[fol. 79] Q. While you were getting your change you mean?

A. Yes. Before she gave me the change she took this paper, this slip out of her pocket and wrote it down.

Q. And she put it in her pocket?

A. Her left breast pocket.

Q. After you got your change you drove your car away from this station and went across the street, is that right?

A. I did.

Q. When did you get this Government's Exhibit 2 for identification?

A. Pardon?

Q. When did you get it?

A. After I came back to the garage, after Agent Pearman purchased the gasoline.

Q. After you identified yourself to Miss Steele?

A. That is right.

Q. And you asked her why she sold you gas without coupons?

A. That is right.

Q. And you asked her for this piece of paper?

A. And the money also.

Q. And the money also?

A. Yes, sir.

Q. And all these writings were on it at the time you got it?

A. Yes, sir.

Q. Did you have her initial it?

A. I did not.

Q. Wasn't that important?

A. No, it was not.

Q. Did you initial it?

A. I did.

Q. And that appears right here, does it not, up in the lefthand corner (indicating)?

A. My initials and Agent Tarter's initials.

Q. Can you tell by looking at this what these other figures mean (indicating), besides the ones you have pointed out to me?

A. (Examining.)

Q. Well, maybe I can simplify it. Do those other figures refer to your transaction with her with regard to your 11.8 [fol. 80] gallons of gas?

A. No. The only ones that I know of are the ones that she marked down. At first when she marked it here on the left, where I have initialed it (indicating), I said I didn't understand, that was too much charged, so she wrote that down again on this side.

Q. As a matter of fact, Mr. Sussman, you asked her to make this out, didn't you?

A. No, sir, I did not.

Q. Didn't you say you had to show it to her boss, to show how much you paid for gas?

A. I did not.

The Court: May I see it?

(Mr. Spieler hands to the Court.)

Q. Well, are we——

The Court: Wait a minute. (Examining.) Counsel, it seems to me there are a number of other items on that card besides that one transaction.

Mr. Spieler: That is right.

The Court: Go ahead.

Q. Mr. Sussmann, what kind of a car did you use when you drove into the defendant's gas station?

A. I used a gray 1942 Plymouth sedan.

Q. Is that your own car?

A. That is right.

Q. What is the capacity of the tank? How many gallons does it take?

A. 16 gallons.

Q. 16?

A. That is right.

Q. So I suppose you had approximately 5 gallons in there when you drove into this station?

A. Approximately.

Q. Now was there anybody present when you drove in [fol. 81] and asked Miss Steele to give you gas besides Miss Steele and yourself?

A. As I pulled in Mr. Davis—I learned it was Mr. Davis later—drove out in his car. He was standing on the floor near his car. He got in the car and drove out.

Q. Well, he drove away from the station?

A. That is right.

Q. Were there any other customers present, I mean?

A. Not near the gas tanks. There were other customers over near where a row of tires was on the opposite side.

Q. Where was Miss Steele when you drove in?

A. She was at the gas pump, standing at the gas pump.

Q. Did you ever tell her you knew Jack Davis?

A. I did not.

Q. Did you tell her Jack Davis was a friend of yours?

A. I did not.

Q. That every time you came in after he is out to eat at home, you always got gas from his employees?

A. I did not.

Q. Didn't you have any conversation with her before she gave you the gas?

A. No, I didn't.

Q. You merely said "Fill up my tank"?

A. That is right.

Q. And you told her, of course, beforehand that you did not have any coupons?

A. That is right.

Q. After that was over you told us you sent another agent across the street to do the same thing as you did, to buy gas?

A. I did not get that.

Q. (Read.) (Continuing) And that agent's name is——

A. Pearman.

Q. Pearman?

A. Yes.

Q. You gave him a marked $5 bill?

A. That is right.

[fol. 82] Q. What time did he cross the street to buy gas from Miss Steele?

A. About 10 to 15 minutes after I did.

Q. And do you know how many gallons he got?

A. No, I do not.

Q. Did he get one of those cards which is Government's Exhibit 2 for identification?

A. I don't know.

Q. Well, you know he did not get one; isn't that so, Mr. Sussman?

Mr. Hartfield: I object to that. He has answered the question.

Q. You testified in the first trial, you know that——

A. You mean you are referring to this card——

Q. No, the card——

The Court: Well, the witness does not say he got that card at the time he purchased this gas. He says he got this card—exhibit what is it?

Mr. Spieler: 2 for identification.

The Court: —2 for identification when he went back to the station after Pearman had also made a purchase, and when this witness demanded from this Miss Steele the money that had been paid and also the card on which she had made a record of the sales. That is when the witness got the card, according to his testimony.

Did you see her make this record?

A. I saw her made my record. I didn't see her make Pearman's.

Q. I mean this particular record which appears on Government's Exhibit 2 for identification.

A. Which one are you referring to, counsel?

[fol. 83] The Court: The one as to your sale.

Q. The one which you told us she took out afterward.

A. Yes. I saw her make this on the opposite side of the sheet when I asked her—I told her I did not understand how much the overcharge was. She wrote that down again. You have both figures the same.

Q. In other words, you really saw her make this out before you drove away in your automobile?

A. I saw her make it out before I paid her. She had the $5 bill in her hand. She made that out before she gave me change.

Q. You wanted her to make it out, didn't you?

Mr. Hartfield: I object to that, what he wanted her to do.

The Court: Overruled.

A. I didn't know she was going to make anything out. I just thought she was going to give me change.

Q. Well, after Agent Pearman bought the gas he returned to you and the other agents across the street?

A. That is right.

Q. Then all of you came back to this gas station?

A. That is right.

Q. Now tell us exactly what happened.

A. I went up to Vivian Steele with Detective Fitzpatrick and the other agents gathered around the station—it is a very large station—and I talked to Vivian Steele with Detective Fitzpatrick after identifying ourselves. I asked her for the money I had given her, asked her for the card, which is Government's Exhibit 2, which she had in her possession. She gave me the money and I took out the two marked $5 [fol. 84] bills, gave her the rest back. I took the card on which she had written, Government's Exhibit 2, from her.

Q. Did you tell her then she was under arrest?

A. Not right at that point, and I asked her if she knows she had done wrong by selling gasoline without coupons and charging over the prices for it. She said she did. I asked her why she did it and she said she did it on instructions from her boss, Mr. Davis, Jack Davis.

Q. What time was that when you did all this questioning of Miss Steele?

A. Oh, I judge it was between a quarter to two and two o'clock.

Q. Where was Davis at that time?

A. He wasn't in the garage then.

Q. When did Davis come into the garage?

A. Why, I judge a little after two.

Q. What did you do when Davis came into this garage a little after two?

A. Vivian Steele says "There's Mr. Davis now, his black Cadillac pulled in through the rear door." Davis got out of the car and started to walk toward us and I walked up to Davis and identified myself and told him he was under arrest.

Q. What did you tell him he was charged with?

A. I didn't tell him anything at that time.

Q. Did you tell him why you were placing him under arrest?

A. I identified myself and told him he was under arrest.

Q. Did you tell him why?

A. I did not.

Q. Did he ask you why?

A. Not at that time.

Q. All right. What took place after you told him he was under arrest?

A. I told him I wanted to look in his automobile.

[fol. 85] Q. You wanted to examine his automobile?

A. That is right. So he took the keys from his pocket and he opened the car, the trunk compartment, the glove compartment, and I examined it. He wanted to know what it was all about. I told him about the sale of the gas to me without coupons and that he had instructed Vivian Steele to do so. I walked back with him to Vivian Steele and I had her repeat the same story in Mr. Davis's presence.

Q. Who else was present besides you, the defendant and Vivian Steele?

A. Detective Fitzpatrick, Detective Colby, Agent Pearman and Agent Tarter were all within the circle. Any of them could have heard the conversation.

Q. But you do not know whether or not they did hear it?

A. Detective Fitzpatrick heard it. He was standing right near me.

Q. Well, after you confronted this defendant with Miss Steele as you have just told us, what did you do?

A. I waited with Agent Tarter to start his check on the gasoline pumps and the coupons, and he had asked Mr. Davis, after he had completed the check, if he had any more coupons, and Mr. Davis said no. Agent Tarter informed me that there was 1,500 gallons shortage. I asked Davis if he was sure he had no other coupons in the place. He said absolutely not, he didn't have any. I asked him if we could look in his office. His office was locked and he said he did not have the keys. Just prior to that he had handed something to a man whom I later learned was Payne. I sent Agent Pearman after him.

Q. Where were you when he handed this something to this other person whom you later on learned was Payne?

A. Oh, about four or five feet away from him. He walked away.

[fol. 86] Q. You mean you allowed him to walk away after you told him he was under arrest?

A. Certainly.

Q. Where was Payne at that time?

A. Standing about 8 or 10 feet away.

Q. You say you saw Davis hand something to Payne but you did not know at that time what he handed him?

A. That is right, I did not.

Q. What did Payne do?

A. Payne started to leave when I motioned to Agent Pearman to follow him.

Q. After Agent Pearman followed him what did you do so far as the defendant is concerned?

A. We walked into a little waiting room in front of the office.

Q. Was anybody else with you?

A. Detective Fitzpatrick and myself.

Q. And the three of you sat down in the waiting room?

A. That is right.

Q. What time was it?

A. Oh, I judge that must have been around three o'clock, a quarter to three.

Q. And how long did the three of you stay in the waiting room?

A. We talked there for about ten or fifteen minutes.

Q. Is that all?

A. In the waiting room, yes, sir.

Q. Did you try to convince Davis that he ought to open that door leading into the private office?

A. I didn't try to convince him. I told him that he would have to open that door.

Q. Did you tell him if he did not you would break it down?

A. I did not tell him that at all.

Q. What did you actually say to him when you said—excuse me, you told us a minute ago that you told him that he had to open the door.

A. That is right.

[fol. 87] Q. What did you say to him; tell us?

A. I asked Davis to be sure that he had no more coupons in there—if he was sure he had no more coupons in there and Davis said no. Davis tried to talk Fitzpatrick and I into saying what he could do about it without any further trouble. We told him there was nothing he could do about

it. We explained to him where he was wrong and where he would be better off by voluntarily showing everything he had, if he had any coupons, or showing us in the office, which we had a right to see.

Q. Will you tell us exactly what you told him?

A. I am telling you exactly what I told him.

Q. Well, you said you explained to him he would be better off if he let you in the office?

A. No, sir, he would be better off by cooperating with us and showing us any other coupons if he had them there, and as we were explaining that Agent Pearman walked in and handed him a ring of keys and said, "These keys are still hot."

Q. Agent Pearman came back with keys and you say he gave it to the defendant Davis?

A. That is right.

Q. He did not give it to you?

A. No.

Q. He did not give it to Detective Fitzpatrick?

A. No.

Q. But he gave it to the defendant Davis?

A. That is right.

Q. What happened after that?

A. Davis opened the door of the office and we went in.

Q. Before the door was opened by Davis, as you told us, what did Detective Colby do?

A. I didn't see Detective Colby. I left Detective Colby outside in the garage.

Q. Didn't you see him trying to force a window which leads into the private office?

A. I did not.

[fol. 88] Q. Was Fitzpatrick with you all the time in this waiting room in the presence of Davis?

A. He was.

Q. Did Davis at any time say to you or to Fitzpatrick "Colby does not have to do that. I will open the door for him"?

A. No, he did not.

Q. Referring to Colby trying the window.

A. He didn't say that to me. I didn't hear all the conversation. He might have had with Fitzpatrick but to me he didn't say that.

Q. Did Fitzpatrick ever leave the waiting room while the three of you were sitting in there?

A. He did.

Q. How long was he gone?

A. A few minutes.

Q. How long were you there altogether before the keys were delivered to Davis by Pearman?

A. Why, I judge from between one and 3.30.

Q. What time was this door opened which leads into the private office?

A. Approximately 3.30.

Q. Well of course Davis opened the door with the keys?

A. He did.

Q. And after you got into the private office what happened?

A. Davis walked over to a metal filing cabinet, which was in the shape of a safe, opened it and handed me a number of envelopes. He said "Here are some more coupons." He also handed me these OPA forms, 545R, known as bingo sheets.

Q. I show you Defendant's Exhibit B for identification and ask you to tell us whether these are some of the coupons Davis handed you on June 20, 1944, after the door was opened leading into his private office (handing to witness)?

A. They are.

Q. Is that right?

A. Yes.

Q. Did you place your initials on those coupons?

A. I did not.

[fol. 89] Q. Did you ask Davis to do so?

A. I did not.

Q. Is there any identification mark on there which you placed so that you could identify these coupons as being the ones you got from Davis?

Mr. Hartfield: Just a minute. I object to this, your Honor, for this reason: I propose to introduce my evidence in my own way and not to have a pretrial made a pretext for finding out all the things I intend to adduce at the trial. Now what identification is made of these exhibits is a question to be brought to this Court's attention when we offer them in evidence, and I will at that time prove that. This is not a question on a hearing on search and seizure.

The Court: All right.

(To witness): You say these are the sheets of coupons that were handed over to you by Davis, is that right?

The Witness: Yes, your Honor.
The Court: All right, go ahead.

Q. You did not make any identification marks on the coupons?
A. I did——

Mr. Hartfield: I object to that.
The Court: No, I will take that.
Mr. Hartfield: That is the whole reason for my——.
The Court: He says he did not make any marks on the coupons, on these coupons.
The Witness: I did, but not the way he stated.
Q. May I ask in what way——
[fol. 90] The Court: No, that you may not.
(To witness): You did mark it in a way so that you could identify them?
The Witness: Yes, your Honor.

Q. Davis gave you those coupons?
A. He did.
Q. And he gave you other coupons, did he?
A. He did.
Q. Such as Defendant's Exhibit A for identification (handing to witness)?
A. Yes, sir.
Q. Did you mark these in any way?
A. No.
Q. And neither did Davis mark them?
A. No.

The Court: Those are bingo sheets, so-called, is that right?
Mr. Spieler: Yes.
The Court: Which Davis gave to you?
The Witness: Yes, your Honor.

Q. Before you went to Davis's place of business did you have a warrant of arrest?
A. I did not.
Q. Did you have a search warrant?
A. I did not.
Q. After Davis gave you these papers which came out of the cabinet, steel cabinet which you say looks like a safe, would you say it was around 6 o'clock?
A. No, it was not.

Q. Was it 5.30?

A. We were down in the OPA office about 5.30.

Q. Would you say you left Davis's place about 5.00 p. m.?

A. Yes, around that time.

Q. When you got to the OPA office did you take Davis to the office of Mr. Burchill, one of the attorneys there?

A. I didn't take him there but I saw Mr. Davis in Mr. Burchill's office.

[fol. 91] Q. Were you present in Mr. Davis's office when Davis was questioned?

A. At the latter part of the—no, I wasn't there when he was questioned, but I was there when Davis made a proposition to Burchill.

Q. What was the proposition?

A. That if he would give him a little time he would set up the man he bought the A coupons from.

Q. Who said anything about buying coupons?

A. Mr. Davis said that to Mr. Burchill.

Q. When?

A. In Mr. Burchill's office about 5.30 on that day, June 20th.

Q. And was Mr. Fitzpatrick present?

A. Mr. Fitzpatrick was there.

The Court: Who said this, Davis or Burchill?

The Witness: Mr. Davis said it to Mr. Burchill.

Q. That he bought these coupons?

A. That if Mr. Burchill would give him a few days' time he would set up the man whom he bought these coupons from.

Q. When you say "these coupons" you are talking about Defendant's Exhibit B for identification (handing to witness)?

A. Well, I wouldn't say which coupons he was talking about but he said he would set up the man who sold him the coupons because there were other coupons there as well.

Q. But he didn't identify any specific coupons?

A. I didn't stay in there that long because I was questioning Payne. I just heard Mr. Davis say that to Mr. Burchill.

Q. Was there a stenographer present?

A. Yes, I believe she was.

[fol. 92] Q. Do you know whether questions asked by Mr. Davis by Burchill were taken down by a stenographer?
A. I don't know.
Q. Well, you do know this, do you not, that Mr. Davis left for home from the office of the Office of Price Administration on that night?
A. I do not.
Q. You did not take him to any station house, did you?
A. I was busy with two other people.
Q. Well don't you know, Mr. Sussman, that he was not arrested until about six weeks afterwards? Don't you know that of your own knowledge?
A. He was placed under arrest by me in his garage.
Q. And then later on brought to Mr. Burchill's office?
A. To the Office of Price Administration, Mr. Burchill's office, but not by me.
Q. Do you know whether he gave bail on that day?
A. I do not.
Q. Do you know whether he was arraigned before a Commissioner in this building?
A. I do not.
Q. On that day.
A. I do not.

The Court: What day are you talking about?
Mr. Spieler: June 20, 1944, your Honor.

Q. You do not know whether he was or not?
A. I do not.
Q. Well, you haven't learned since?
A. I have not.

Mr. Hartfield: We concede that he was not arraigned, your Honor.

Q. Did you at any time tell the defendant Davis, before you brought him to Mr. Burchill's office, what the charge was you had against him?
A. I did.
[fol. 93] Q. What did you tell him?
A. He was charged with the sale of gasoline without coupons at above ceiling prices, and also with possession of coupons with the A sheets, which had the name, registered name piece torn off. That was mutilation of Government currency, ration currency, and also a violation to have in

his possession. He also had pasted on his bingo sheets A11 and A12 coupons which were not valid at that time and which were therefore—was a violation of Ration Order 5C.

Q. You told him all that?

A. I did.

Q. Before you even got into the private office, before you even knew he had those tickets?

A. No, I told him that in his office.

Q. I want to know what you told Davis. You said you placed him under arrest. What did you tell him he did?

A. I did not tell him anything until I got through looking in his automobile.

Q. What did you tell him after you finished examining his automobile?

A. Sale of gasoline without coupons and instructed his employee to sell gasoline without coupons above ceiling price.

Q. Are you sure you confronted this defendant with Vivian Steele?

A. I did.

Q. There isn't any question about it in your mind?

A. No question at all.

Q. And then after that you said to the defendant "You are under arrest"?

A. I told the defendant he was under arrest prior to that. I told the defendant he was under arrest prior to my looking in his automobile.

Mr. Spieler: That is all.

(Witness excused.)

Mr. Hartfield: Call Vivian Steele.

[fol. 94] VIVIAN STEELE, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Hartfield:

Q. Miss Steele, will you talk so that we can all hear you even back here?

A. Yes, sir.

Q. Are you employed by Jack Davis?
A. I am.
Q. Do you see Davis in court?
A. Yes.
Q. Where is he? Would you indicate him?
A. He is sitting there (indicating).

The Court: Talk up now, louder, please.
Mr. Hartfield: Let the record show that the witness indicates the defendant.

Q. Now, Miss Steele, how are you employed and in what capacity by Mr. Davis?
A. Gas attendant.
Q. And how long have you been employed that way?
A. I would say between—around April 15, between April 15th and the date of the raid.

The Court: Between what?

(Answer read.)

Q. Do you remember one day in June when agents of the Office of Price Administration and detectives came to that place?
A. Yes, sir.

The Court: Talk up.

Q. Do you remember Mr. Sussman coming to that place?
A. Yes, sir.
[fol. 95] Q. Did you sell him gasoline without coupons?
A. Yes.
Q. Did you do that on the instructions of Mr. Davis?

Mr. Spieler: I object to any leading questions.
The Court: Yes; sustained.

Q. Had anybody told you to sell gasoline without coupons?
A. Yes, sir.
Q. Who had?
A. Mr. Davis.
Q. And did Sussman pay you for that with a $5 bill?
A. Yes, he did, but——
Q. And how much did you charge him?
A. It was 20 cents.
Q. That is 20 cents above the price for gas?

A. Yes.

Q. Now, Miss Steele, I show you here——

The Court: Now talk up. How many gallons did he buy, do you know?

The Witness: I don't remember.

The Court: All right. Did you make any record of it at the time?

The Witness: To figure up the prices.

The Court: All right, show her that card.

(Mr. Hartfield hands card to the witness.)

The Court: Go ahead.

Q. I show you here what is called Government's Exhibit 2 and ask you if you have ever seen that card before (handing witness)?

A. I have.

Q. Was that your card?

A. Yes, sir.

[fol. 96] Q. And is that what you made the record on?

A. There was no record being made. That is just the way I figured up to him, to keep from cheating other parties and cheating myself.

Q. But you did make these figures on here?

A. That is right.

Q. I show you this figure, 11.8 times 20, which makes up $2.36, and $2.46 added, giving the total of $4.82, and ask you if that is what you did when Mr. Sussman came in?

A. That is right.

Q. Did you have this on your clothing anywhere?

A. Yes, I had it in my pocket.

Q. What pocket?

A. Overall pocket.

Q. Top or bottom?

A. Top.

Q. Did the agents—did the same thing happen with Mr. Pearman?

A. You see, when this first man came in he got a wash, got his car washed. So he asked to fill up his tank, which I did. Well, in the meantime after he got his gas, I put it in the car 11 gallons and 8/10ths, so I told him two stamps and the coupon money. That is on the points. So he said then Mr. Davis had been letting him have gas any afternoon after I had gone home. So I took his story and let him have

it and charged him 20 cents; but when the other fellow came in he asked for five gallons, I gave him five gallons of gas, it was $1.05 and one coupon, but he fumbled—that was a colored fellow. He fumbled in his pocket. He had one loose but he wasn't able to find it. He said, "What will we do?" I said, "Well, I will have to charge you 20 cents extra because I am responsible for the gas." I charged him 20 cents.

Q. You had been told to do that——

[fol. 97] Mr. Spieler: I object to any leading questions.

The Court: Yes; sustained.

Q. Had you been told by anyone at any time about what to do about selling gas?

A. Well, he said there may be a few come in there without coupons and to let them have it.

By the Court:

Q. Were you to sell to them at the same price or were you to charge them extra money if they did not have coupons?

A. Charge them extra.

Q. How much extra?

A. 20 cents.

Q. Double the price instead of single price, is that right?

A. What do you mean by "double the price"?

Q. Well, if gas was selling at 20 cents a gallon and you charged them an extra 20 cents, then you doubled the price, didn't you?

A. That's right.

Q. Is that what you did in this case?

A. That's right.

By Mr. Hartfield:

Q. Now, after you had sold them the agents went away, is that right?

A. That is right.

Q. Did they ever come back?

A. You see, the first went out.

Q. Yes.

A. That is the stout fellow.

Q. Yes.

A. Then the other fellow came, the colored fellow, and he got five gallons. Then when they went out that is when they all came back.

Q. Did they show you the marked money?
A. Yes, sir.
Q. You had that marked money on you?
[fol. 98] A. Yes, I still had it because they had gone out and then come right back.
Q. And you told them that story?
A. I did.
Q. Now later did Davis come?
A. Yes, he came in because he was just going out.
Q. Did you have a conversation and did they ask you questions when Davis was present?
A. That I do not remember.
Q. I did not ask you what you said. I asked you, did you have a conversation?
A. Well, the onliest conversation that I can truthfully say that me and Mr. Davis had was when he was taking the money, he was getting ready to go down to the OPA office.
Q. No. I mean now in the——

Mr. Spieler: I think she answered the question very clearly.

The Court: No; go ahead.

Q. I mean now, at the time where Davis has recently come back. It is approximately 2 o'clock and you and a lot of the agents, four or five of them, and Davis are standing together in a group. Did you have a conversation there? I am not asking you what you said, but did you have a conversation there?

The Court: With the agents.

A. The conversation that I had with the agents before Mr. Davis came in——

The Court: No, this is after that. When Mr. Davis was there and the agents were there.

[fol. 99] Q. I am not asking you what you said. Did you have a conversation?
A. That part I do not recall.
Q. You do not know whether——
A. I wouldn't say yes and I wouldn't say no because I don't remember that.
Q. You are not sure about that?
A. No, sir.

Q. Do you remember ever having stated anything about "orders"?

A. I said that to the agents when they came in because they asked me where I got the orders. I said, "From Mr. Davis."

Q. You don't remember whether you had any such conversation at that time, then?

A. No, sir.

Q. But there is a possibility that you did?

A. Well, there is a possibility I did.

Q. Now, did you ever have any other conversation with Mr. Davis with respect to the testimony you are to adduce here?

A. Not recently.

Q. I didn't ask you "recently." Did you ever have any?

A. Oh, one after the first trial.

Q. After or before?

A. After.

Q. Are you positive about that?

A. Yes, sir.

Q. What did he say?

A. He said; "Change the story."

Mr. Hartfield: Thank you.

Cross-examination.

By Mr. Spieler:

Q. Were you subpoenaed in this court by Mr. Hartfield in January before the first trial started?

A. (No response.)

Q. You were in this building in January under a subpoena which you got from Mr. Hartfield?

A. January 10th.

Q. January 10th, is that right?

A. That is right.

[fol. 100] Q. And you were up on the 13th floor, is that right?

A. I don't know what floor.

Q. Well, you were in this building?

A. That is right.

Q. And you came here for two days?

A. That is right.

Q. But you were never put on the witness stand, is that right?

A. That's right.

Q. That is correct?

A. That's right.

Q. Now; you told us that this man whom you first saw was a fat man——

Mr. Spieler: And we will concede that is Mr. Sussman.

Q. —came to the place of business on June 20th and had his car washed?

A. That is right.

Q. And after he had his car washed he asked you to give him some gas?

A. That's right.

Q. And did he ask you for 11 or 12 gallons of gas; is that it?

A. He said just fill up his tank.

Q. Did you fill up his tank?

A. Yes, I did.

Q. After you filled his gas tank up did you ask him for any gas coupons?

A. I asked him for the money and the coupons.

Q. He didn't tell you before you gave him the gas that he wants gas without coupons, did he?

A. No. The onliest thing he said he wanted was Mr. Davis. I said, "He just went out." He said he was in a hurry.

Q. He said he was in a hurry?

A. Mr. Sussman.

Q. And what else did he say?

A. He told me to fill up his car, which I did.

Q. Did he ever tell you before you filled up his car with gas that he would like to get gas without coupons?

A. No, sir.

[fol. 101] Q. You are sure about that?

A. Yes, sir.

Q. He only told you he did not have the coupons after you filled his tank up?

A. Yes, sir.

Q. Did he ever tell you that he is a friend of Mr. Davis?

A. He said he was. He said he always come in in the afternoon, so I told him I had never seen him. He said he come back after I go home.

Q. Now with reference to this piece of paper, Government's Exhibit 2 for identification, did anybody ask you to make out these figures on here (handing witness)?

A. I make out those figures for the benefit of myself.

Q. In other words, you want to make sure you know what you are doing?

A. That is right.

Q. Did you make them out while Mr. Sussman was there?

A. Standing right there.

Q. And before he paid you?

A. Yes, sir.

Q. Now these other figures on here, on this paper, do they have anything at all to do with this case?

A. No, sir.

The Court: Well, do they relate to other sales that you made? Look at them.

Hand her the paper.

(Mr. Spieler hands to witness.)

The Witness: Yes, sir, they do.

Q. They do?

A. Yes.

The Court: Were they sales that you made without the coupons and where you charged double the price?

[fol. 102] The Witness: Yes, sir.

The Court: How many sales are there on this card, on this exhibit——

What is it?

Mr. Spieler: 2 for identification.

By the Court:

Q. Look at it. Now take your time.

A. Just two.

Q. Well, no; look again.

Mr. Spieler: Hold it.

Q. Check them over. Here, take this thing off (removing piece of paper). Look them over.

A. (Examining.)

Q. Now how many sales are covered by the figures on that card?

A. Three.

Q. What?
A. Three.
Q. Three?
A. Yes, sir.
Q. Were they sales where you charged double the price because the man, the purchaser, did not have coupons?
A. Yes, sir.
Q. All that day, all on the same day, the day that Mr. Sussman came?
A. Yes, sir.

The Court: All right.

By Mr. Spieler:

Q. Now, Miss Steele, after Mr. Sussman came back—by the way, before that happened, you say a colored man came over and asked you for gas after that?
A. He was with him. They came back together.
[fol. 103] Q. He came separately to ask for gas, didn't he?
A. Yes, sir.
Q. And how many gallons did he ask for?
A. Five.
Q. After you gave him the gas did you ask him for his money and the tickets?
A. Yes, sir.
Q. What did he say?
A. He said he had it loose in his pocket.
Q. He had a loose one in his pocket?
A. Yes, sir.
Q. You told us he was fumbling in his pocket?
A. Yes, sir.
Q. What happened after he finished fumbling?
A. He said he couldn't find it.
Q. And what did you say?
A. I told him he has to pay extra for the gas because I was responsible for it.
Q. And did he pay you extra?
A. Yes, sir.
Q. And did you put that on that slip of paper, too?
A. No, sir.
Q. Can you tell us why you did not put that one on?
A. Only because there was five gallons.
Q. He only bought five gallons?
A. Yes, sir.

Q. You mean if it is more than five gallons you make a record of it?

A. Well, it was because the fraction that is hard to figure.

By the Court:

Q. You could figure it because it was a round sum?
A. That is right.
Q. Five times twenty is a dollar?
A. That is right.
Q. And how much did you charge him?
A. $2.05.
Q. Why did you add the extra five cents?
A. Well, that is what the pump calls for.
[fol. 104] Q. The pump called for $1.05, did it?
A. Yes, sir.
Q. Or $2?
A. $1.05.
Q. $1.05?
A. Yes, sir.
Q. And then you added an extra dollar, was that it?
A. Yes, sir.

By Mr. Spieler:

Q. Did Mr. Sussman ask you to explain to him how you arrived at these figures?
A. No, sir, he didn't.
Q. But you were making up these figures in his presence, while he was there?
A. Just the 11 gallons and 8/10ths.
Q. And you made this out while Sussman was there?
A. Yes, sir.

The Court: At the time he made the purchase?
The Witness: That's right.

Q. Well, I noticed you have here twice 11.8 times 20, and then you added on $2.46, and you have it again here in this corner (indicating)?
A. That is the same thing.
Q. You figured it out twice?
A. Yes.
Q. But it is just one sale?

A. That is right.

Q. Now when Mr. Davis came back——

The Court: Wait a minute.

By the Court:

Q. One set of figures is on the reverse side, is that right —not on the reverse side?

Mr. Spieler: On the other side of the paper.

[fol. 105] Q. One set of these figures, about the 11.8 sale is in the upper lefthand corner and the other is in the lower righthand corner, is that right?

A. It was the way the paper was folded——

Q. And in addition to these two separate calculations of this 11.8 gallon sale is there a record on this card of two other sales? Look at it (handing witness).

A. Yes, sir.

The Court: All right, go ahead.

By Mr. Spieler:

Q. After this sale was made to Agent Pearman, the colored agent, did Mr. Davis come into the place of business?

A. He came in, yes.

Q. When he came in, when Davis came in were all the five agents on the premises?

A. Yes, sir.

Q. And did they all question you before Mr. Davis came in?

A. Yes, sir.

Q. What did they ask you?

A. When they came back?

Q. In other words, before Mr. Davis came back to the premises what did Agent Sussman ask you?

A. He didn't ask me anything right then. He said, "You are under arrest." I said, "For what?"

Q. What did he say?

A. He said, "For selling black market gas." I told him it wasn't my station.

Q. You told him it was not your station?

A. I said, "I am only working for the man."

Q. And did anybody else question you besides Sussman?

A. Somebody spoke up and says, "Well, who gave you orders?"

[fol. 106] Q. You do not know who that is?

A. No, sir, I do not.

Q. And what did you say?

A. I said, "From Mr. Davis."

Q. And by that——

A. So he said, "Where is he?" I said, "He is out." So by that time he came up.

Q. Well, after Mr. Davis came up, as you put it, were you taken before Mr. Davis or in Mr. Davis's presence and were you asked those questions over again?

A. I do not remember because they carried me in the waiting room, I know.

Q. They put you in the waiting room?

A. Yes, sir.

Q. Who watched you in the waiting room, if anybody?

A. Well, they didn't watch me. Mr. Sussman came out——

Q. Who put you in the waiting room?

A. I don't remember exactly who carried me, but——

The Court: Did they have to carry you or bring you in?

Mr. Spieler: Well, your Honor, that is just an expression.

The Witness: No, they did not bother putting their hands on me or anything. They only said to go into the waiting room.

The Court: You went?

The Witness: One of them came in and said, "Sit down in there for a few minutes."

Q. And you waited in that waiting room?

A. That is right.

Q. When you went into the waiting room, where was Mr. Davis?

A. On the outside.

Q. Did they ever ask you to go out of the waiting room and did they bring you in the presence of Davis and ask [fol. 107] you to repeat answers to certain questions?

A. That part I do not remember.

Q. You don't remember it?

A. No, sir.

Q. How many times were you in Mr. Hartfield's office in connection with this case before the first trial?

A. Once or twice, I don't remember.

Q. Did you give him a statement?

A. I had already given a statement to the OPA the first time.

Q. You mean a stenographer was present?

A. Yes, sir.

Q. And you answered questions?

A. Yes, sir.

Q. Do you know whether they asked you there if you were brought in the presence of Mr. Davis and asked you whether or not he told you to sell over the ceiling?

A. That part I do not remember, sir.

Q. Well, if you saw your statement would it refresh your memory as to whether or not that question was asked?

A. Yes, I believe it would.

Mr. Spieler: May I ask to have her look at that statement?

The Court: Well, I will look at it and see if it is on there, Counselor. Hand it up here.

Now repeat that, Mr. Stenographer.

(Question read.)

Mr. Hartfield: We will concede it doesn't say it in the statement.

The Court: I know, but I want to look at it, Counselor.

Mr. Hartfield: Certainly (handing to Court).

The Court: (After examining) All right, I have examined [fol. 108] the statement produced by the Government, and it does not contain any reference to any question of this witness in the presence of Mr. Davis, no reference to it at all, Counselor.

By the Court:

Q. But, Madam, about the extra price that you charged where the customer did not have his coupon, I asked you some questions and I used the expression "double the price" where the gasoline price was 20 cents a gallon. Now what was it you added to the regular price? Suppose the price was 22 cents a gallon. What would you add to that price in the case of a customer who had no coupon?

A. You mean 22 cents a gallon on the pump?

Q. Yes, 22 cents on the pump. What would you add?

A. 22 cents.

Q. 20 cents a gallon?
A. Yes, sir.
Q. So the extra charge was 20 cents a gallon, is that right?
A. That is right.
Q. In addition to what the pump showed?
A. That is right.

The Court: All right.

By Mr. Spieler:

Q. Were you ever threatened unless you testified against Davis you would be indicted?
A. No, sir.
Q. No one threatened you?
A. No, sir.
Q. How many times were you in Mr. Hartfield's office?
A. Once or twice—before the first trial?"
[fol. 109] Q. What is that?
A. Before the first trial?
Q. Yes.
A. Once or twice, I don't remember.
Q. How many times were you there after the first trial?
A. I wasn't there any until the other day, after I got that subpoena.
Q. When did Mr. Hartfield ask you if Mr. Davis ever told you to change your story?
A. The first day I got this subpoena in February.
Q. In February or January?
A. January.
Q. Yes. When did Mr. Hartfield ask you that question?
A. During January, before the 10th—it was before the other trial.
Q. Right before the other trial?
A. Yes, sir.
Q. And did you tell Mr. Hartfield that Mr. Davis told you to change your story?
A. He didn't say I should. He said, "You should change your story."

By the Court:

Q. Was that before the first trial?
A. Yes, sir.
Q. Or was it between the first trial and the second trial?

A. It was before.
Q. Before?
A. Yes.
Q. Mr. Davis said that to you?
A. Yes.

By Mr. Spieler:

Q. And you told that to Mr. Hartfield?
A. He asked what did Mr. Davis said to me. I told him nothing. He said was I sure. I said the only thing was I should change my story.

The Court: Who said that to you?
[fol. 110] The Witness: What?
The Court: That you should change your story; Mr. Hartfield or Mr. Davis?
The Witness: Mr. Davis.

Q. And you told that to Mr. Hartfield?
A. Yes.

The Court: When? When did you tell him that?
The Witness: Before the first trial.
The Court: You told that to Mr. Hartfield before the first trial?
The Witness: Before the first trial.

Q. And he did not put you on the witness stand in the first trial?
A. Who?
Q. Mr. Hartfield.
A. I asked him not to.
Q. You asked him not to?
A. I don't want to get up here and hurt somebody. If I can't help them I don't want to hurt them.
Q. And you mean Mr. Hartfield accommodated you. He said, "I won't put you on?"
A. He didn't say anything.
Q. Now, you were only working for Davis on June 20th for approximately six weeks. You got there around April 15th?
A. Between the 15th and the 30th of April.
Q. Well, you were there about two months altogether?
A. Yes, sir.
Q. How did you get the job?
A. Through the paper.

Q. Through an ad?

A. That is right.

Q. You mean to tell us that Mr. Davis told you, although you were there only about two months, to sell over the ceiling without coupons?

A. (No response.)

Q. Could you answer that question?

A. Yes, he did.

[fol. 111] Q. Did you ever get any coupons and you did not report it to Mr. Davis?

A. Did I ever get any?

Q. Yes.

A. For myself?

Q. Yes.

A. No, sir.

Q. Never did?

A. No, sir.

Q. How many coupons did Mr. Sussman have to give you for the 11 gallons that you sold him—11.8 gallons?

A. He would give me two tickets or three and tell me owe him.

Q. What was that? Give you two or three and let you owe him? I do not understand that. How many tickets would he have to give?

A. If somebody wants 14 gallons of gas or 13 gallons of gas and he comes in and give you coupons, say they want 10 gallons and maybe they do not take but 8.9 and the tank is filled up, they give me two coupons for 10 gallons and I give them a slip for the difference of it, saying, "I owe you so many gallons," to make out the 10.

Q. How many coupons would Mr. Sussman have to give you——

A. Three.

Q. —for the gallons that you sold him?

A. Three.

Q. Three?

A. That is right.

Q. Each coupon calls for how many gallons?

A. Well, if he had Cs it would be five; Bs would be five; As were only three—As were three at that time.

Q. Well, if you sold him approximately 12 gallons you would get three As, is that right?

A. He could give me three—it is according to what kind of stamps he would give me. That is the thing about it.

Q. Isn't there a little shield on the windshield telling you what kind of books he has, whether it is A, B or C?

A. I didn't look on his windshield.

[fol. 112] Q. How many times did you sell gas without coupons and charge more than 20 cents a gallon?

A. That I wouldn't know.

By the Court:

Q. Well, about? How long had you been doing it? For how many days or weeks or whatever it was?

A. I think about 10 or 12.

Q. 10 or 12 days?

A. Customers.

Q. Customers?

A. Yes, sir.

Q. Over what period of time; over how long a time?

A. About three weeks.

By Mr. Spieler:

Q. You mean regular customers?

A. They come about once a week.

Q. You mean you would sell to regular customers?

A. It's according to how they wanted it.

Q. Would you sell to strangers?

A. No, sir.

Q. And Sussman and this colored agent were strangers to you, is that right?

A. They were strangers, but I was listening to Mr. Sussman's story.

Q. In other words, they fooled you, did they not? Would you have given them gas if you knew they did not have any coupons?

A. No, sir.

Mr. Spieler: That is all.

By the Court:

Q. But these regular customers that you say you had, they could get gas without coupons if they paid the extra [fol. 113] 20 cents a gallon, is that right?

A. But they did not do so much of that buying.

Q. What?

A. They didn't buy so much.

Q. Well, when they did buy they would be charged the extra 20 cents a gallon?
A. Yes, sir.

Redirect examination.

By Mr. Hartfield:

Q. All this was on June 20th or the latter part of June as you remember that?
A. Yes, I remember that was in June.
Q. And you continued to work for Davis after that—in fact, you are still working f[illegible] him, isn't that right?
A. That is right.
Q. Did you sell gas without coupons after the arrest?
A. No, sir.
Q. Now I call your attention to a Dr. King and ask you whether you sold him gas without coupons after the arrest?
A. We have sold Dr. King gas, but I don't think it was after, not without coupons.
Q. You are sure of that?
A. I am almost sure.
Q. Now you know Mr. Davis has been arrested three times——

Mr. Spieler: He was arrested twice, not three times.
Mr. Hartfield: I object to that——
Mr. Spieler: You wouldn't want to bet your life on it.
The Court: Now wait, Counselor.
Mr. Hartfield: Yes.
The Court: That doesn't carry any probative value here at all.
[fol. 114] Mr. Spieler: There is no jury. I am not trying to impress anybody.
The Court: I know, but there is a Court. You will have the proper respect for the fact that this is a judicial proceeding. Don't make remarks of that kind. Go ahead now. Whether he was arrested two or three times is not germane to the issue that I am trying now.

Q. Did you sell gas between any of the three arests?
A. Well, I do not know anything about but one arrest.

Mr. Hartfield: All right, thank you. I have no further questions.
The Court: All right, step down, Madam.

(Witness excused.)

Mr. Hartfield: Does your Honor want to continue?

The Court: Oh yes, I mean to go on with the trial tomorrow morning.

Mr. Hartfield: All right, sir.

The Court: We are in the trial now, the trial of this particular issue, but I mean before the jury.

Mr. Hartfield: Your Honor, I did not quite understand whether when you said to me, "Put on all your witnesses, Mr. Hartfield," whether that was a request of your own or whether you left it up to me to decide.

The Court: I leave it to you, Counselor.

Mr. Hartfield: Thank you, sir. Then the Government rests insofar as the motion to suppress is concerned.

[fol. 115] The Court: All right, the Government rests. Go ahead.

MOTION TO SUPPRESS EVIDENCE

Mr. Spieler: Well, I renew the application made to suppress the evidence based upon the Government's testimony upon the grounds that it is perfectly apparent that there was no consent here, that a trap was laid for an employee so that they can have some excuse for placing somebody under arrest and based on the theory of an arrest that they could go in and search the premises. There is no evidence of any——

The Court: Counselor, all I have heard so far is the uncontradicted statement of the Government's witnesses.

Mr. Spieler: And that is the reason I am saying, even on their statement there is no proof——

The Court: Not at all, I do not agree with you.

Mr. Spieler: —that they have sufficient probable cause.

The Court: If you are asking the Court now to rule that the evidence should be suppressed in view of the statements of the Government's witnesses, I must deny your request.

Do you intend to offer any evidence on that issue?

Mr. Spieler: Well, if you deny it, I do. I respectfully except, and I am putting the defendant on the stand.

The Court: All right, have him take the stand. You are calling him.

Mr. Spieler: Oh yes, I am calling him.

The Court: All right, go ahead then.

[fol. 116] JACK DAVIS, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Spieler:

Q. Mr. Davis, you are the defendant in this proceeding?
A. I am.
Q. What business are you in?
A. I am in the used car business, the tire recapping business, the new tire business, the steam cleaning of buildings, the washing of cars, servicing and the sale of gasoline.
Q. Are all those businesses located at 720 Southern Boulevard, Bronx?
A. Yes.
Q. How long have you been there?
A. Approximately ten years.
Q. You operate under a corporation name?
A. Davis Auto Laundry Corp.
Q. Do you hold any office there?
A. I am president.
Q. Now tell us, if you recall, what happened on June 20, 1944, in your place of business, at approximately 1.30 p. m.?
A. I went to lunch about twelve-thirty or one o'clock. I returned and drove into my place of business and drove along the washstand at about a quarter after one. The reason I drove on the washstand was because there were two or three cars spread across the center driveway so that no car could enter in any other manner.
Q. Whose cars were they?
A. I later learned that they belonged to the gentlemen who were surrounding Miss Vivian Steele.
Q. You mean the OPA agents and the detectives?
A. Correct.

[fol. 117] Q. What happened after you parked your car?
A. The building at that point is about 250 feet long. I walked to my left after leaving the car and walked to the tire recapping shop, which is also located on those premises. I was in a conversation with a prospective customer and I noticed a group of men surrounding Miss Vivian Field, which was about 150 feet from that point. There are two sets of gas pumps on the premises, one towards the wholesale side of the building or the Southern Boulevard entrance,

and another set of pumps near the Bruckner Boulevard side, which is the easterly side of the building, and the office is located approximately halfway into the building.

Upon entering the building I could not see the group of men because the shadow cast by the pumps and the wall of the building would not permit anyone from the outside to see anyone near the pumps, but once your eyes became accustomed to the light inside you could notice someone at the pumps.

I met the customer and walked to the group of men and Miss Steele. They in turn walked towards me except Miss Steele, who was left behind. I directed my remarks to Mr. Sussman, I believe, and said, "Can I help you?" and he said "You sure can," in a rather rough sort of voice. And I said, "Why, what can I do for you?" Come on inside, I want to talk to you." I said, "Who are you?" He didn't answer me.

Several of the other agents replied, "Do you want us to send you a letter?" It seemed rather strange to me that whoever they are, they should certainly identify themselves. They were burly and tall, gave the appearance of being some sort of law enforcement officers. Why they hesitated to disclose their identity I couldn't at that time determine. [fol. 118] I stood my ground and I was almost bowled over by Mr. Sussman. I said, "Will you identify yourself?" No,—no answer from him.

Q. "Is that your car?" Mr. Sussman asked me that. I says, "It belongs to the corporation."

Q. Try to step it up a bit, Mr. Davis.

A. "Let us search the car, and we will search you, too." He went through my pockets, felt my garters, took my hat off, looked inside the sweatband, felt all along my person, asked me if I had anything in my shoes, whether I had something in my socks.

He then walked to the car with me, in the meantime examining the wallet that he found in my pocket, looked through that, returned it to me, looked at the money I had in my pocket, returned that to me—my wallet, rather.

He then looked in the glove compartment, the trunk, under the floor mats, the seats; kneeled down to look under the car to see whether there was anything attached to the bottom of the automobile.

Apparently satisfied that he couldn't find anything on either my person or in the automobile, we walked back

towards the group of men assembled at the counter directly in front of the waiting room which in turn leads into the private office. I said, "Mr. Sussman, now that you"—I addressed Mr. Sussman when I said, "Now that you have searched me and looked at my car, will you do me a favor and tell me who you are? This is as far as I go." So he opened his wallet, then went like that (demonstrating).

Q. He opened it and then closed it?

A. That is right. He might have had a Third Avenue Railway pass in there.

Q. He folded the wallet?

A. That is right, something like that (indicating). Just open it and shut it.

[fol. 119] Q. What happened after that?

A. "Come on in the office. We want to talk to you."

At no time was I approached by Miss Steele. She wasn't near me. As a matter of fact when I walked towards the office I attempted to address her and said "What is wrong, Miss Steele?" but I was cut short, I believe, by Detective Fitzpatrick and Colby. They told me, "No talking." I said, "Haven't I any right to talk to my employee?" "No talking." And from their manner it was apparent that it was either "No talking" or something in the nature of physical violence would happen to me if I did.

Mr. Hartfield: I move that that be stricken.

The Witness: Well, it is a fact.

The Court: Denied.

Q. Well, anyway, they said "No talking."

A. Yes.

Q. What did you do?

A. They led me into the waiting room and we sat down on a couch. Detective Fitzpatrick asked me what my total gallonage was, what my ration allotment was, and I replied it was 2200 gallons. He said, "Where do you keep your coupons?" "A percentage of them should be in the boxes which are attached to the gasoline pumps, so that the attendant, when receiving the coupons from a customer at the time that a sale of gasoline is made got the coupon or a receipt similar to those which a customer may present to her (indicating).

These receipts are for gasoline coupons left with me by customers who, during the gasoline shortage, were at

their wit's ends trying to obtain gasoline, and they felt that by leaving their coupons with me they would be assured of obtaining their allotment when the particular ration [fol. 120] number of gasoline coupon became due, and the coupon or receipt which I gave them for the gasoline coupons that they left with me were so marked. Well, a number of these were——

By the Court:

Q. What would you do with the coupons that the customer gave you for the receipt?

A. I took the customer's license number and I marked it on a sheet of paper. There was a letterhead bearing "Davis Auto Laundry Court." That, plus the coupons, were on my desk.

Q. No, no. I mean the customer's coupons, when he turned them over to you, what did you do with them?

A. I laid them on my desk.

Q. On the top of the desk?

A. Yes. I had a folder, a manilla folder, normally used in a file. I had several folders there to denote the day that the coupon would be valid, so that I could present—so that I could place them on a bingo sheet, some of which we already saw, and present that to my gas supplier in return for gasoline delivered to me.

Q. Were you receiving from the customers coupons before they were due, and giving him a receipt for gasoline?

A. I gave him a receipt, but I did not honor the receipts unless they bore the number of coupons that the receipt represented. In other words, here——

Q. How would your attendant at the gas pump be able to tell? You say you have—what is this thing you are handing to me?

A. Similar to it.

Q. This is one of your receipts?

A. Yes, sir,

Q. Well this one you hand up, says "12 gallons, 5/2/44, [fol. 121] Davis Auto Laundry Corp.," and underneath that—is that your signature?

A. That is correct.

Q. How about——

A. On the reverse side.

Q. On the reverse side it says what?

A. No. 12.

Q. That means the number 12 coupons?

A. That is correct. Now if it bore number 11, it would not be honored. If it bore number 10 it would be honored; if it bore number 9, it was honored.

Q. Now the period during which the coupon that bore the number 12 would be on it was known to you, is that right?

A. I don't get that.

Q. The OPA announced the period during which A coupon numbered 12, for instance, would be good, is that right?

A. They announced that about two days in advance, is that right?

A. Yes.

Q. And in June 1944 there were as many different types of coupons as that, the number 11s, the number 12s, and the like? And the number 10s?

A. The books, when issued to motorists, bore 9, 10, 11 and 12, and they each had——

Q. How many of each?

A. Eight of each.

Q. Eight of each?

A. That is correct.

Q. What was the A coupon good for?

A. Three gallons for each coupon.

Q. I see. All right. That would mean that a customer who would give you—you say three gallons for each coupon?

A. Three gallons.

Q. He would give you four coupons and you would give him this receipt, is that right?

A. That is correct.

Q. And you would put on the back of the receipt the number of the coupon, is that right?

A. That is right.

[fol. 122] Q. And then if your customer presented that receipt to——

A. Miss Steele.

Q. The operator at the pump, he would get gas corresponding to it?

A. Yes.

Q. Why did you do that?

A. Well, many people—many motorists felt that inasmuch as their wives leave their ration coupons with the

butcher and the houseowner feels that he leaves his fuel oil ration stamps with his oil supplier to draw upon as they become valid and due, many of them felt that it was perfectly all right to leave the coupons with their gasoline supplier, particularly during that time when there was a gasoline shortage, where most stations would not honor the coupons of the average motorist who drove in. They said, "Well, you are not my customer. I can't take care of you."

Q. No, but what about the agent at the pump who was selling the gas? He wasn't getting a coupon.

A. He had this here (indicating).

Q. I know, but that is not a coupon; that is something you wrote out.

A. Because I accepted the coupon, I had to give the customer some——

Q. Didn't the regulations require that the coupon be presented when the gas was being bought?

A. I believe that the regulations say nothing about having someone leave their coupons with me, to act as their agent.

Q. And you are the man who is selling the gas?

A. Correct.

Mr. Hartfield: Would your Honor care to see that particular regulation that you spoke of?

The Court: Yes. What is it.

[fol. 123] Mr. Hartfield: Exactly what you said, that it must be delivered at the time of the gas (handing to Court).

The Court: Well, all right, you can get it later. Go ahead, Mr. Spieler.

By Mr. Spieler:

Q. Now, Mr. Davis, after your car was searched and you went into the waiting room with some of the officers, tell us what happend there?

A. I told Mr. Fitzpatrick that my gallonage was 2200, and he asked me to produce the key for the boxes which were locked on the pumps containing coupons received during that particular day's sales.

Q. Did you produce the keys?

A. I did.

Q. Who did you give them to?

A. I had given them—I think I gave them to Mr. Pearman—Mr. Pearman.

Q. Who?

A. Mr. Pearman.

Q. Well, did he open those little tin boxes?

A. He did.

By the Court:

Q. You gave the keys to Pearman, is that it?

A. That is right.

Q. The key for these little boxes that you had at the gasoline pumps?

A. Yes.

Q. The boxes where the attendant would drop the coupons in, is that right?

A. That is right.

The Court: All right; go ahead.

By Mr. Spieler:

Q. And you know he emptied those boxes?

A. He did.

[fol. 124] Q. And you know he found coupons in there together with these receipts similar to the one that you have shown to the Court?

A. I would say he found about a dozen receipts like that in there.

Q. What happened after that? Did he give you back the keys?

A. He handed the keys back to me at the same time, asking me what these receipts were for.

Q. Did you explain it to him?

A. I did, just as I explained it to his Honor.

Q. Then what happened?

A. I then put the keys in my pocket and watched Mr. Pearman count the coupons that were in the boxes and totaled them.

Q. Did he ask you for a measuring stick?

A. I believe he—no, he did not ask me for it. I saw it in his hands. How he obtained it I don't know.

Q. And he used a measuring stick to measure the quantity of gasoline in your tanks?

A. There were four 550-gallon tanks, and he measured four of them.

Q. After he measured the quantity of gas in your tanks and after he had added up these receipts and coupons, which

he found in the tin boxes, what did he do, if you know? Did he come back to you and say anything?

A. He didn't say anything at all.

Q. Where were you all this time?

A. Standing at the counter outside, watching him do this.

Q. After he did all this, what happened?

A. I was told to come in the office again by Detective Fitzpatrick and Mr. Sussman.

Q. You mean the waiting room?

A. In the waiting room.

Q. Or the office?

A. In the waiting room, that is correct.

Q. You went in there, did you?

A. Yes, sir.

[fol. 125] Q. Who went with you?

A. Mr. Fitzpatrick and Mr. Sussman.

Q. And what happened in there?

A. They demanded that I open the door.

Q. What door?

A. The door leading to the office.

Q. What time was that that they first made that demand or request?

A. I would say it was about two o'clock.

Q. Tell us what took place in there, what conversation?

A. They used abusive——

Q. Tell us what they said; don't characterize it. Just say what they said.

A. Well, I am afraid I am not quite as much a linguist as Detective Fitzpatrick is, but it was along those lines, implied threats as to what would happen to me if I did not open the door, that the door would be broken down, that they would find some way of getting in the office.

Q. Did you notice what agent or detective Colby was doing?

A. Not at that time. I noticed detective—or rather, Mr. Pearman and the other OPA agent walking around the place looking at tires and picking up different objects on the counter for display, and looking in the show cases, and I said, "Pardon me, one minute," to Mr. Sussman, and I walked out of the place, and he permitted me to go. I walked to Mr. Payne, who at that time was my partner in the tire business only, and I handed him the keys—this was the same batch of keys that contained the keys to open the boxes. That key—that batch of a dozen keys also fitted

the office door, and it was my intention at that time that I would not permit them to go into my office inasmuch as they had abused me, they never identified themselves and were treating me as though I had done something which I had not done.

[fol. 126] By the Court:

Q. Did they ask you to open the door of the office so that they could check for other coupons?

A. Their manner was not like that at all, sir.

Q. Well, did they tell you how many coupons they had found in these boxes?

A. No, sir.

Q. Did they tell you there was a shortage?

A. No, sir.

Q. They did not say there was any shortage of coupons——

A. They did not say anything.

Q. —for the gas that had been used or sold?

A. They did not say anything about that.

Q. During all the time they were there?

A. During that entire conversation.

Q. Did they ask you for other coupons that you had?

A. They—Mr. Fitzpatrick remarked, "Where do you hide your coupons?" I said, "Mr. Fitzpatrick, I don't hide my coupons. They are on my desk inside, but you are not going to get in there with your manner."

Q. Was that the reason you would not let them in because of his manner, his bad manners?

A. I think that was sufficient reason. No one told me I was under arrest. No one said——

Q. Well, did you know that these men were OPA agents?

A. No, sir.

Q. They never told you that?

A. They never told me that.

Q. What did you think they were?

A. They were some sort of law enforcement agents but what they were I don't know.

Q. What did you say?

A. When they checked the gas tanks I assumed that they were OPA agents. Who else would have control of gasoline?

[fol. 127] Q. Yes. They had added up the coupons taken from these boxes at the gas pumps, hadn't they?

A. Yes.

Q. And they had measured the gasoline tanks?
A. Right.
Q. And then they asked you about other coupons, and you said you had them on your desk?
A. Correct.
Q. But you would not let them look at them?
A. If they had changed their manner I certainly would have opened that door.

The Court: All right.

By Mr. Spieler:

Q. Was there anything ever said that unless you opened the door they would break it down?
A. This was said repeatedly during a period of I would say from two o'clock until about five, in the waiting room outside of my office.

Mr. Hartfield: Could I adjourn for a minute, your Honor? I will be right back.
The Court: Yes, you may have a few minutes.

(Short recess.)

(Last question and answer read.)

Q. And who said it?
A. Detective Fitzpatrick and Mr. Sussman.
Q. Did you see anybody attempting to open a window which leads into the private office?
A. I did.
Q. Who was it?
A. Detective Colby.
Q. When did he do that?
A. While I was being questioned or spoken to by Mr. [fol. 128] Sussman and Detective Fitzpatrick.
Q. In the anteroom or the rest room, is that right?
A. Yes.
Q. Now when you gave Payne the keys did you tell Payne, "Throw them away," or anything like that?
A. When I handed Payne the keys, I said "These fellows haven't any right to search me or to search the premises, and they are not going to abuse me any further. Hide these keys."
Q. You told Payne to hide the keys?
A. Right.

Q. Did anybody see your give the keys to Payne?

A. They may have.

Q. How did the keys get back into the possession of either yourself or the agents?

A. When I noticed Detective Colby trying to force a window leading into the office, I directed Mr. Sussman's attention to Detective Colby trying to force the window. We were only about three feet away from him. We couldn't avoid or help seeing him. I said, "There is no point in breaking the place. If you are going—if you are going to break the window I might as well open the door for you." So Detective Fitzpatrick said, "You have your choice. We will either break the door or we will force the window. We have been playing with you long enough."

Q. So what happened after that?

A. So I told Mr. Sussman that I had given Mr. Payne the keys for the office.

Q. And did Sussman go for the keys?

A. He walked out of the office for a minute, and spoke to Mr. Tarter or Mr. Pearman, I am not sure which it was.

Q. Well, one of the agents anyway.

A. And he returned in a few minutes with the keys.

[fol. 129] Q. Who did?

A. Mr. Sussman.

Q. What did he do with them?

A. He tried two or three of them in the office door, and he eventually found the right one.

Q. And he opened the office door?

A. He opened the office door.

Q. He testified that the keys were given to you to open the door?

A. No, sir.

Q. Did you have them?

A. I did not have the keys in my hand until the agents were ready to leave. I picked them up off the desk.

Q. All right. You got into the private office, and what happened in there?

A. On my desk were two folders, one marked "Current OPA Gasoline Coupons" and the other folder was marked "Future OPA Gasoline Coupons,"—regular yellow folders that are used in filing cabinets. They were both on my desk. The cabinet mentioned by Detective Fitzpatrick and Mr. Sussman is always open because the lock—there isn't any lock on it. It has been broken.

Q. Well, what did they do in your office, if anything, these agents, after the door was opened? Did they proceed to search your place?

A. They ransacked the place. They ran through every paper and every voucher. They tried lifting up the linoleum on the floors. They just didn't miss a thing.

Q. Did they open any doors to safes or cabinets?

A. No, the cabinet was open. They ransacked that.

Q. Did you bring out any papers out of the cabinet?

A. I didn't put a hand on anything. It was on the desk.

Q. Did anything come out of the cabinet?

A. Outside of some tire certificates.

[fol. 130] Q. Do you know where Defendant's Exhibit B for identification came from (handing)?

A. Well, those coupons, similar to that, were——

Q. Was it on your desk?

A. It was on my desk.

Q. Or in the cabinets?

A. It was on my desk, in the file.

Q. Did you see any of the agents pick them up?

The Court: Now which is it, on the desk or in the file? I don't know.

A. When I say the file, I mean a folder. That is really a file, call it—these manila folders.

The Court: On your desk?

The Witness: On my desk.

The Court: All right.

Q. Did any coupons come out of that steel cabinet?

A. No, sir.

Q. Well, the point is this: did you help them in their search or did they do all the searching themselves?

A. They did it themselves.

Q. After they completed the search when you were asked to identify any papers, were you asked to initial any papers or put your name on any papers?

A. No, sir.

Q. What time would you say the search was completed?

A. About five-thirty.

Q. And what did they do after that?

A. They said they were going down to 350 Fifth Avenue.

Q. The OPA office?

A. The OPA.

Q. Did they take you down there?
A. They did.
Q. Who else went?
A. I met Payne and Miss Steele down there.
[fol. 131] Q. What time did you arrive at the OPA in the Empire State Building, what time?
A. I would say about six o'clock.
Q. What happened after you got there?
A. I was placed in a room with Detective Colby, that was marked "Squad Room" or "Assembly Room," something like that.
Q. How long did you stay there?
A. About an hour.
Q. What happened after that?
A. I was then led into Mr. Burchill's office.
Q. Who brought you there?
A. Detective Colby, I believe.
Q. When you came into Mr. Burchill's office, did you have a conversation with Mr. Burchill?
A. He questioned me as to how I had obtained the coupons.
Q. What did you say?
A. I told him I had received them from customers and that the coupons that the agents found—the receipts that the agents found in the boxes would bear me out. I also called his attention to the letterhead which bore the license numbers of the coupons which were left with me by the customers.
Q. What letterhead?
A. There was a letterhead, "Davis Auto Laundry Corp." on there, with the license number on these coupons.
Q. What happened to that?
A. Mr. Hartfield can best explain that.
Q. In other words, you say they took that away with these other papers?
A. That and two 100-gallon inventory coupons which were pasted on bingo sheets.
Q. How long had you talked to Mr. Burchill?
A. About twenty minutes.
Q. Did you get into a heated discussion with him?
A. He was dissatisfied with my explanation.
[fol. 132] Q. What did he say?
A. Well, he used language similar to Mr. Fitzpatrick's.
Q. Well, did he say he would arrest you, or did he say

he would lock you up for the night, or did he tell anybody to book you?

A. He did. He told Detective Fitzpatrick to take me out—"Lock him up."

Q. What time was that?

A. About 7:30.

Q. Was there a stenographer present?

A. No, sir.

Q. Did there come a time when you left Mr. Burchill's office with Detective Fitzpatrick?

A. I did.

Q. And you got to the elevator?

A. Yes.

Q. Was there any conversation there?

A. I said to Detective Fitzpatrick "What on earth do they want with me?"

Q. What did he say to you?

A. He said, "I don't know, Davis. They just want you to talk their way."

Q. What did you say?

A. I said, "I told them the truth."

Q. Then what happened?

A. He then led me back to Mr. Burchill and Mr. Burchill suggested to me that if I set up, to use his term—set up my supplier—in other words, someone who sells me coupons, he would see what he could do for me.

Q. Did you ever tell Mr. Burchill or Mr. Fitzpatrick or any agent that you bought these coupons from anybody——

A. No, sir.

Q. —by the name of Tony?

A. No, sir.

Q. When you came back into Mr. Burchill's office did he return some coupons to you?

A. He returned 980 gallons, I believe.

Q. And did you give him a receipt for it?

A. I did.

Q. Can you tell us why he gave you those coupons back?

A. Because I explained to him that in taking approximately 1900 gallons in coupons from my desk and 335 gallons [fol. 133] which were in the boxes, leaving 325 gallons in the tank, he would leave me without any coupons to continue business with, and I expected a delivery the following day.

Q. Then he gave you those 980 coupons to continue your business?

A. Temporarily, yes.

Q. Was there any reason for it? Did you make him any promise or did you say you were going to do anything for him?

A. No. He probably felt it might help me see things his way.

Q. Well, was there anything said there about if anyone approached you in the future in an effort to sell you coupons that you would get in touch with Mr. Burchill?

A. I said that, yes.

Q. Did you ever tell Mr. Burchill that sometimes people come around to gasoline dealers and offer for sale coupons?

A. I believe I had that conversation.

Q. Did you ever tell him that you bought the very coupons now in question?

A. No, sir.

Q. No statement was taken from you at all?

A. No.

Q. Now did you ever give a statement to Mr. Hartfield on July 20th, 1944, in this very building?

A. My statement was in effect the very same thing I repeated to Mr. —what I had previously said to Mr. Burchill.

Q. Now was there a stenographer present in Mr. Hartfield's room?

A. I don't think so.

Q. You are not sure?

A. I am not sure.

Q. You were permitted to go home by Mr. Burchill on June 20th?

A. Yes.

Q. And you did go home?

A. Yes, sir.

Q. Did Mr. Burchill ever communicate with you by telephone a short time thereafter?

A. About two weeks later he called me on the phone.

[fol. 134] Q. What did he ask you to do?

A. "Are you ready to turn in anyone or cooperate with me?"

Q. What did you say?

A. I said, "Mr. Burchill, no one has shown up here, and if someone does I will be glad to call you."

Q. All right. Then what happened after that? Did you hear from him again?

A. No. About three weeks following his phone call, which would make it about five or six weeks after the initial visit by the OPA men, I was approached by Detective Fitzpatrick and placed under arrest. He showed me a warrant.

Q. In other words, about six weeks after June 20th?

A. I believe so.

Q. You were placed under arrest?

A. Yes.

Q. Now you heard Vivian Steele testify that she sold gas without coupons and above the ceiling price pursuant to your instructions. You heard her say that here?

A. Yes, sir.

Q. Did you at any time authorize her or instruct her to sell gasoline without coupons above the ceiling price?

A. No. The only instruction I gave her that if any coupons or any receipt which was presented which bore the rubber stamp "Davis Auto Laundry Corp.," so that there would not be set aside for any customer, she was to exchange gasoline for the receipt. Now she may have access to additional gasoline coupons where, in the case of Mr. Sussman, if he bought twelve gallons that would leave him owing her a minimum of twelve gallons in coupons. Now he could either give her three A coupons, or he could give her three C or B coupons. The B or C coupons would total 15 gallons, leaving her in possession of 3.2 gallons which she could do [fol. 135] with as she pleased. I expected that from any attendant. That is all part of the business.

Q. How long was she working for you?

A. About five weeks.

Q. Did you advertise for help in the newspapers?

A. In the New York Times.

Q. And that is how you got her?

A. Correct.

Q. Never knew her before?

A. No, sir.

Q. Did you check up her references?

A. Frankly, I did not.

Q. Is there any difficulty in getting help these days?

A. Yes, there is.

Q. Now she testified further that before the first trial, which took place on January 10th and 11, 1945, that you asked her if she was called as a witness, to change her story.

A. I never had any conversation with her.

Q. Did you ever ask her to change her testimony?

A. No, sir, and I see her every day.

Q. You know she was subpoenaed in the first trial, don't you?

A. Yes.

Q. And you know she was here?

A. Yes.

Q. On two different occasions; you know that, don't you?

A. Yes.

Q. And you also know she was not called as a witness by the Government?

A. At the last trial, no.

Q. Now she said that she has sold gas above the ceiling without coupons on several occasions to your knowledge.

A. How would I have knowledge?

Q. Do you know anything about her selling gasoline above the ceiling without coupons?

A. I just explained that I would assume that a certain [fol. 136] percentage might be sold that way. It wasn't any control that I would have over it.

By the Court:

Q. Well, did you have a practice where a customer turned in three stamps and his tank would not hold all the gas that the three stamps would entitle him, to give him a receipt for the difference?

A. Some customers insisted on a receipt and others said, "Keep it," to the attendant.

Q. No, I am asking you, did you have that practice if a man wanted a receipt for the difference?

A. Yes, we gave it to him.

Q. And you found customers, with gasoline being rationed, who would say to an attendant, "You keep the difference"?

A. If it were three-tenths or two-tenths. We had half a million gallonage during those years—a half a million gallons, and if that is repeated ten times on two-tenths of a gallon, ten times that is two gallons.

By Mr. Spieler:

Q. What the Court wants to know is whether anybody would give gallons of gas away——

The Court: Yes.

Q. in view of the shortage.

The Court: Yes. I was just wondering if that is the way they tip a gas attendant, by giving him two or three or two and a half gallons of tickets or coupons.

[fol. 137] The Witness: Well, it was either that or with the shortage so severe at that time, if a customer left less than 10 or 15 cents as a tip I think the attendant sort of cursed him very quietly. It was either that or you let him have——

Mr. Hartfield: I did not get that—the attendants what?

The Witness: Well, sort of swore at him, thought he was a cheapskate.

Q. Now, Mr. Davis, when these agents of the Government and the detectives questioned Miss Steele in your place of business, was there ever a time when you were confronted by her and in your presence did she ever say that you told her to sell gasoline above the ceiling?

A. No, sir, I was distinctly warned by Detective Fitzpatrick and Colby or one or two of the others not to have any conversation with her, and they told her the same thing in front of me.

By the Court:

Q. Now will you tell me, Mr. Davis, why it was that when you knew that these men were OPA agents you did not show them the coupons that would correspond to the gasoline that had been taken from the tanks and end the thing?

A. Well, your Honor, after about an hour and a half of abuse, as you might call it, a person takes just so much and no more.

Q. I know, but in the first five minutes of the abuse, you never said to them, "Now, here, my records are all straight. You go out and measure the tanks and examine the coupons in the boxes at the pumps. Then come back here in [fol. 138] the office and I will show you coupons for the balance?

A. Yes, but——

Q. "There is no shortage."

A. Yes, but I had coupons left by customers and in that way I might—I might involve customers in some sort of red tape with the OPA.

Q. Not if the customers had given you coupons that were then usable. How could you involve any customer?

A. Well, your Honor, when a customer came in for nine gallons of gas and the attendant put the nine gallons in his tank, she then asked him for his coupons, although the regulations say ask for it first, and he might have two No. 10 coupons which were valid at that time. Then we are forced to take a No. 11 whether we want to or not, or else drain the three gallons out of the tank. That is done repeatedly in every station.

Q. I know, but you can ask "Where are your coupons?" and look at them and be sure that they are the coupons.

A. In advance?

Q. Why, of course, before you put the hose in the tank at all.

Mr. Spieler: Your Honor is correct. There is no question about it, but all of these gasoline dealers may as well close up their premises if that is the way they are going to conduct business.

The Court: Well, I think that is hardly so because if they had gas to sell there are people who would be very glad to buy the gas with coupons that are valid coupons, and that are then—what shall we say—which is good currency for the gas life—in other words, within the period of their validity. There must be something in the manner in which [fol. 139] gasoline is sold to these people by the wholesalers which will afford a measure of the demand by retailers, who are entitled to gasoline because they possess coupons. In other words, wholesalers could properly sell only if they in turn received coupons from the retailer. Isn't that right?

Mr. Spieler: That is right.

The Court: And the retailer could properly sell only if he got coupons from the automobile driver.

Mr. Spieler: The motorist, yes.

The Court: That is right, the motorist.

Mr. Spieler: Yes.

The Court: So that is supposed to be the check, so there should be a supply available for every valid current coupon.

Mr. Spieler: That is true, but many——

The Court: If a man had the gas he would not be left with the gas in his tank, if he is a retailer, just because he took the precaution to say "Where are your coupons?" before he made the sale.

Mr. Spieler: But many motorists who are regular customers of this defendant many times give him coupons which are not yet valid.

The Court: Oh.

Mr. Spieler: That is not a crime; it is a violation of a regulation but it is no crime.

Mr. Hartfield: I beg your pardon, it is a crime.

Mr. Spieler: It is not.

The Court: Now here the crime would be in honoring those coupons in advance of the date when there was legally——

[fol. 140] Mr. Spieler: Without his knowledge. They say "What am I going to do; I haven't got any more." He would either have to drain the gas out or——

The Court: Well he could do that too if he had to——

By the Court:

Q. And it has been done, you say, right at your station?

A. Drain the gas?

Q. Yes.

A. No, sir.

Q. Where a customer did not have the coupon or had a later coupon?

A. We accepted the later coupon.

Q. No.

A. Your Honor, we were stuck with a price ceiling, and if a person came in and bought five gallons of gas, we are working on two cents. Now, for a ten-cent item we first had to ask them for their gas coupons.

Q. Yes.

A. Then, dispense the gas, then——

Q. No. If there is anything wrong with the margin of profit that they allow you, that is something you men in that line of business under the Act, under the statute, may take up in the proper way, and if you are not satisfied with it, at least if you don't get relief from the OPA there is an appeal to the Board of——

Mr. Spieler: The Emergency.

The Court: —to the Emergency Court of Appeals; but while the regulations are in effect you have to obey them.

A. Your Honor, I have a letter from the Bronx County Medical Society on that table there (indicating), requesting me to designate my station, as I had on a previous occasion,

[fol. 141] for the sole use of physicians in Bronx County because of the gasoline shortage. The stations are on allotment, not according to how many coupons they turn in.

Q. I know they are on allotment, but so are the motorists, and I suppose there is a proper balance between the number of coupons that are issued to motorists and the amount of gasoline that wholesalers are allowed and that wholesalers may sell to retailers.

The Court: All right, go ahead now. Next question.

By Mr. Spieler:

Q. Miss Steele never said in your presence and in the presence of these agents, that you told her to sell gasoline without gasoline coupons and above the ceiling price?

A. I never had any conversation with Miss Steele from the time I first saw her surrounded by the agents until the following day when she showed up for work.

Q. Who else sells gas there besides Miss Steele and yourself?

A. Well, it wouldn't be anyone at this time.

Q. Well, in June, 1944, did you ever have any other employees besides Miss Steele?

A. At the same time?

Q. Yes.

A. No, not on gasoline.

Q. Well, how do you verify whether or not Miss Steele is giving you an honest count?

A. The pumps have meters on them and they show the exact amount of money; due me and they show the exact number of gallons dispensed from the pump, and I total the four pumps together and I have my answer. Then in checking, if the pumps should call for, say, $200 in cash, I want $200 in cash. If the number of gallons sold should call [fol. 142] for, let us say, 100 gallons in gasoline sold, I look for 100 gallons in coupons from her.

Q. What would you do if there weren't any coupons in the tin boxes to equal the amount of gasoline which was sold? Let us assume she sold gasoline above the ceiling price without coupons, without your knowledge? How would you make her account for it?

A. There wasn't any such thing. I told her, when I hired her——

Q. In other words, it never happened, to your knowledge, since she was employed by you?

A. That is correct.

Q. In other words, would you say she accounted for every gallon of gasoline she sold either by these receipts or gasoline coupons?

A. My instructions to her were to accept the gasoline coupons from the customers. She on many occasions said they at first do not want to do it. I didn't pursue the matter any further. I assumed she would obtain the coupon either before or after the sale was made. I know my account always tallied with what I was supposed to have.

Q. Now these coupons, Defendant's Exhibit B for identification, can you tell us now where you got them from?

A. I received them from different customers, the license numbers of which were marked on that letterhead.

Q. And you know the names of the customers, do you?

A. I do.

Q. I do not want the names, but you know the names?

A. Yes, sir.

Q. And you are going to have them here as witnesses?

A. I hope so.

Mr. Spieler: That is all.

[fol. 143] Cross-examination.

By Mr. Hartfield:

Q. Mr. Davis, I show you Defendant's Exhibit B, and I ask you not whether these were the ones at your station but I ask you whether similar things like these were found at your station, that is A-10's, A-11's, and A-12's?

A. They were.

Q. Is that part of your system of issuing credits that you have told us about?

A. Yes.

Q. It is?

A. Yes.

Q. Will you please explain to me how you ever know, when a customer comes in to buy gas, how many coupons to take off them, since the names aren't on here?

A. Well, that one sheet calls for 72 gallons, eight for each number—now that sheet originally started with No. 9—9, 10, 11, and 12, was on the ration card when it was originally

issued from the OPA. Now that gives us 72 gallons on that sheet for each group of eight coupons. In other words, there were eight 9's, eight 10's, eight 11's, and eight 12's on that sheet. For each group of coupons I gave the customer 24 gallons in receipts and on the back of that receipt I marked either "No. 9, 10, 11, or 12," and they were not valid so far as my station was concerned until the respective dates when they were to become valid, were due.

By the Court:

Q. All right. Now look at the receipt. Have you those receipts?

A. I made these up, sir.

Q. All right.

The Court: Hand up Exhibit B.

(Same handed to the witness by the clerk.)

[fol. 144] Q. Now when those receipts came in, out of the box at the pump, one of your service men having sold the gas, how would you know which of these sheets it applied to?

A. I would not at that time.

Q. These sheets on Exhibit B.

A. I knew I had issued a receipt for gasoline for each one I had taken in, as long as it tallied at the end. In other words, if I had accepted 200 gallons of coupons I would have 200 gallons of receipts when they came due.

Q. Did you ever find you had any sheets left over where the customer did not use the receipt card you gave him?

A. I don't think so.

Q. What?

A. I don't think so. I may have had No. 12's because they were eventually invalidated by the OPA.

Q. But 10 and 11, did you ever have any left over of 10 and 11 on any of these cards?

A. No, sir. As a matter of fact I couldn't make good on some of them because the OPA had taken the coupons and I couldn't replace them.

Q. The customer got these receipts?

A. Yes.

Q. Is that right?

A. Yes.

Q. It was just as easy for the customer to use the stamps, wasn't it?

A. Not necessarily so, sir.

Q. Why wasn't it?

A. Because they felt once they gave me the coupon they placed me under obligation to give them gas.

Q. But if they were out on the road and they had to get some gas could they use your receipt?

A. No, sir, but they had other books. They had C books or they had B books.

Q. In addition to their A books?

A. Yes, sir, every motorist.

Q. Well, suppose a motorist had only an A book—he was one of those who would rate only an A book—what about [fol. 145] that motorist?

A. Your Honor, how far could he wander with about a gallon of gas per week?

Q. Well, it is not a question of a week. He could, if he had these coupons, get three gallons, couldn't he?

A. Yes.

Q. Or if he hadn't used his car for two weeks he could use two of the coupons and get six gallons?

A. No. I believe he could use part of one coupon.

Q. Well, weren't these coupons good for a period?

A. Well, they changed them. Sometimes they make it last three months; sometimes two months; sometimes four months.

Q. Yes. So they represented the allotment that a motorist got over a certain period of time?

A. Yes.

Q. And how could he, out on the road if he ran short of gas, get any gasoline with these receipts that you say you had to give him?

A. I can't account for that, sir.

By Mr. Hartfield:

Q. Now Mr. Davis, I call your attention to the lady sitting back here (indicating), and ask you whether that was not the stenographer present in my office when I took a statement from you. Does that refresh your recollection?

A. No, sir.

Q. You do not——

A. I don't recognize her; I don't know.

The Court: Will you stand up, Madam—step forward.

(A woman in the rear of the courtroom stepped forward.)

A. Frankly, I don't know.

[fol. 146] The Court: Well, is it that you say she was not there or what?

The Witness: I just don't remember, sir.

The Court: All right.

Mr. Spieler: May it please your Honor, Mr. Hartfield in the first trial admitted that he had a statement and I am conceding that he gave him a statement. I do not know why he raises that question.

The Court: Well, your client does not.

Mr. Spieler: Well, he has not been refreshed sufficiently, I think.

The Court: All right, go ahead.

Q. Now Mr. Davis, you were in my office on July 20th. Were you arrested again thereafter for the sale of coupons for the third time?

A. When you say "third time" I think you are mistaken, Mr. Hartfield.

Q. Now let us get that straight, since there has been an argument on it. You were arrested on June 20th.

A. I was taken to the OPA.

Q. All right. We won't argue as to whether that is an arrest at the time. Then you were also arrested on a warrant in respect to this charge?

A. Yes.

Q. And then you were arrested later on another charge in that you sold coupons after we allege, isn't that correct?

A. Yes.

Q. Now on one of those occasions do you remember me taking a statement from you?

A. I believe you asked me the very same questions that Mr. Burchill asked me on June 20th, and I believe my replies to you were practically the same.

[fol. 147] Q. Now I show you Defendant's Exhibit B. I want to ask you whether these were coupons left by people who were to get the gas from it—is that right—eventually—I mean that is your general theory?

A. Yes.

Q. Did you ever tell me in a statement that they were given to you by people who went in the Army?

A. You at that time called my attention to other 11's and 12's which were pasted on bingo sheets and I told you there is a possibility that some of these customers may never come back, they may have entered the Armed Services or moved out of the neighborhood, but you never applied that particular question to those particular seven books.

Q. Do you remember this question being asked of you, page 4:

"Q. Mr. Davis, could you tell me just exactly how you got those A coupon sheets which were left with you by the customers?"

And do you remember making this answer: "Customers came in, at the time the B-2 had just expired—about expired—and many customers fearing that they would not use their coupons before the expiration date turned them in to me. There were others who go into the Army and 'I have been doing business with you for a long time, Dave, here's the coupons I have received,' and I gave each one a receipt for the coupons I took."

A. I was talking about B-2 coupons, not A's.

Q. No, I am not.

A. You just read it.

Q. You say something about B-2; I don't. You say "Customers came in, at the time the B-2 had just expired."

My question has the words "A coupon sheets" in it.

A. And my reply mentions B.

[fol. 148] Q. Just a minute, Mr. Davis. We will do this over again. The question that I put to you was "Mr. Davis, could you tell me just exactly how you got those A coupon sheets which were left with you by the customers?" and do you remember making this answer: "Customers came in, at the time the B-2 had just expired—about expired—and many customers fearing that they would not use their coupons before the expiration date turned them in to me. There were others who go into the Army and 'I have been doing business with you for a long time, Dave, here's the coupons I have received,' and I gave each one a receipt for the coupons I took."

Now do you remember saying that?

A. I am applying that to B-2. I evidently misunderstood your question at that time.

The Court: All right, that is his explanation. Go ahead.

Q. Now, Mr. Davis, you say that you never told Mr. Burchill that you had bought gasoline stamps, is that correct?

A. That is right.

Q. And do you remember — asking you whether you had done that?

A. I gave you the same reply.

Q. And do you remember being asked this question, page 6:

"Q. Did you promise Mr. Birchall that you would reveal the source of the A coupons that you had in your possession?" And do you remember making this answer: "A. You told me not to answer any questions that I didn't want to." Do you remember that?

A. I wouldn't change it any, Mr. Hartfield.

[fol. 149] Q. Now do you remember me asking you this question:

"Q. As I understand it, you refuse to answer that on the ground that you might be incriminated?" and do you remember making this answer: "A. Yes."

A. Mr. Hartfield, you are an attorney, I am not.

The Court: No, no. The question is, was that question put to you by Mr. Hartfield, and did you make that answer?

The Witness: I believe I did.

The Court: All right.

Q. How could you have been incriminated if you had not made that statement?

A. Mr. Hartfield, I just replied that you were an attorney and I was not. I wasn't represented by any attorney, and to my knowledge, from your line of questioning, you were trying to lead me into a trap that might convey the impression that I had told Mr. Birchall something like that.

Mr. Hartfield: I submit the answer is not responsive.

The Court: All rght, never mind. That is his explanation. Go ahead.

Q. Do you remember me asking you this question:

"Q. Up to the present time, Mr. Davis, have you been in touch with Mr. Birchall as to the source of the A coupons that were found in your possession either by telephone or coming into the office?" And do you remember making no

answer to that? And then do you remember me asking you this question:

[fol. 150] "Q. You refused to answer that on the ground that you might be incriminated?" And do you remember making the answer: "Yes."

The Court: Did that happen? Is that the question that was put to you and did you make that answer?

The Witness: I believe so.

The Court: All right.

Q. How could you be incriminated in respect to that—withdrawn. You had answered all of my questions previous to these last two, and I inform you that they took six pages; is that correct?

A. I wouldn't know how many pages.

Q. Well, I will inform you of that. You answered many questions before that?

A. Yes.

Q. Why, when you got to these two, did you think that I was trying to entrap you?

A. Mr. Hartfield, you called my attention to the fact that I was not to answer it unless I felt I wanted to, and I gave you my answer.

Q. Then I said to you after that:

"You refused to answer that on the ground that you might be incriminated?" And you said "Yes."

That is a little different.

The Court: All right, he said that. He says he said that. Go on to the next. Come on. It is twenty-five minutes to six.

Mr. Hartfield: I will be very very short, your Honor.

(Mr. Hartfield confers with Mr. Tarter.)

[fol. 151] Q. Mr. Davis, you have testified that you got these particular coupons from various customers, is that right?

A. Yes.

Q. Would you mind letting me know the names?

A. No, sir.

Mr. Spieler: I object to that because they are our witnesses and I am not going to reveal the names of witnesses to the prosecutor.

Mr. Hartfield: He has opened the door to that.

Mr. Spieler: I said specifically I did not want him to give the names. I merely asked him if he got them from customers.

Mr. Hartfield: He said "Are you going to have them here as witnesses?"

The Court: Well, it is not material to the issue I have to decide. Objection sustained. The next question.

Q. Mr. Davis, I show you here some other bingo sheets marked Defendant's Exhibit A, with coupons on them, and I ask you whether they are recognizable to you as coupons that were in your place (handing)?

A. (After examining) All coupons look alike. I couldn't truthfully say that these are mine.

Q. Well, do you remember having any bingo sheets with A12s on them?

A. Yes.

Q. Why did you put the A12s on them?

A. Because I had received them from customers when they did not have sufficient coupons to cover the current sale—in other words, a man bought, say, six gallons and he had only one number 10 coupon and he had given his 11s [fol. 152] away to some other station or possibly our own, I was forced to accept the number 12s.

Q. Did you know it to be a fact that no A12 coupons were ever valid?

A. Well I was stuck with them, that's all.

Q. Do you remember what coupons were valid at the period we have under discussion, June 20, 1944?

A. I think the number 10s were valid at that time.

Q. All right. Then if a man gave you another coupon because he did not have enough coupons, why wouldn't he give you a number 11?

A. I just explained that to you. Remember, I was not at the pump. I had an attendant who is practically new there and she is not too well versed with rationing, perhaps you would not be either were you not a prosecutor here day after day.

Mr. Hartfield: I submit the answer is not responsive.

The Court: We will let it stand. Go on.

Q. Mr. Davis, did you personally put the 12s on these sheets, or on any sheets?

A. I couldn't say, Mr. Hartfield.

Q. Did you ever put any 12s on a sheet?

A. Yes.

Q. You did?

A. Yes, because——

Q. During a period when 10s were valid?

A. Yes, because I had intended turning them over to my supplier when they became due.

Q. When they became due?

A. Because that made up my inventory. I was out of luck with them.

Q. You admit you issued gas for A12s when they weren't valid?

A. Yes, I couldn't help it.

[fol. 153] Q. And you admit that you issued gas for the A11s when they weren't valid?

The Court: Is that correct?

A. Well, of course we issued gas because we couldn't help ourselves, every time we issued receipts.

Q. Did you give instructions that that take place, that coupons be accepted when they are not valid?

A. I left instructions with Miss Steele that I wanted a coupon, I didn't care what it was, a coupon——

Q. Did you——

The Court: Let him finish.

Mr. Hartfield: I am sorry.

A. (Continuing) —to obtain for each and very gallon——

Q. Did you know——

A. Pardon me, may I finish, Mr. Hartfield?

Q. Yes.

A. A coupon for each and every gallon sold through the pumps, whether she was forced to take an 11 or 12, or 13, if there was one, so that there wouldn't be any black marketing in my place.

Q. Did you know that was a violation of gasoline regulations?

A. It was safer than making a sale without coupons, and that is what would happen.

Q. In other words, you just tried to violate the regulations a little bit?

A. In preference to selling without coupons, yes.

Mr. Hartfield: I am finished with the witness, your Honor.

[fol. 154] Redirect examination.

By Mr. Spieler:

Q. Do you know when A12 became invalid?
A. Some time in November, I believe.
Q. November, 1944?
A. That is right.
Q. And you did not know that it was going to be invalidated in June of 1944, did you?
A. It was not announced until the day before their use was prohibited.
Q. In other words, you thought that some day in the future A12 would be valid?
A. Right.
Q. And you would be able to turn them in?
A. Or else I would have a shortage on my books.
Q. You didn't answer—you just nodded your head.
A. Yes.

Mr. Spieler: That is all.

Recross-examination.

By Mr. Hartfield:

Q. Now, Mr. Davis, I have only one or two more questions. I show you again Defendant's Exhibit B. The sticker is off. They are the same coupons. I note that they are all torn off. Did you tear the tops off?
A. May I see that? (Same handed to witness.) Mr. Hartfield, these were torn by seven different people.
Q. They were?
A. Yes, seven different people.
Q. May I have that, please.
A. And they are not torn that way now.

The Court: Were there seven different people?
The Witness: Seven different customers that gave that to me.

[fol. 155] Q. May I have them now.
A. (Hands to counsel.) They are not torn that way now.

Q. Now folding these in my hands like that (indicating), I point out to you that there is no dispute that they have all been torn at once since all the pumps at the top here are the same. Do you see that (indicating)?

A. When, Mr. Hartfield?

Q. Now I ask you when?

A. I am asking you—and at what time, I am asking you.

The Court: Now you don't ask questions. He is not a witness.

Mr. Spieler: Well, he cannot answer that.

The Court: Did you note that that is the fact? Look at them and see.

The Witness: I just replied to Mr. Hartfield they were torn entirely different.

The Court: No, but I say, do you note that that is the fact now, that apparently they were all torn at one and the same time?

The Witness: Yes.

The Court: All right.

Q. Did you tear them?

A. No, sir.

Q. Did you ever tell anybody that you tore them?

A. No.

The Court: What is the exhibit you are showing the witness?

Mr. Hartfield: Exhibit B.

Q. Did you see all the seven people tear their tops off when they tore them?

A. Yes, I instructed them to.

[fol. 156] Q. You instructed all seven people to tear the tops off?

A. Yes.

Q. Why did you instruct them?

A. Because they would be unable to obtain the new ration books when the new ration books were issued, unless they had the tops from this book—and mind you, these books never had any name on them. They never had that name because when the ration board issued the books they simply issued it with the license number in pencil, and I have one in my desk there (indicating).

The Witness: May I have that, Mr. Spieler, please.

The Court: Never mind now, go ahead.

Q. Did you tell Mr. Birchall that you tore these coupons off so that your customers would not get in trouble?

A. No, sir.

Q. I beg your pardon—question withdrawn. Did you tell Mr. Birchall that you tore the tops off so that your customers would not get into trouble?

A. No, sir.

Q. You say the customers did?

The Court: Yes, he did. He said each one tore it off separately.

By the Court:

Q. They weren't all in your office at one and the same time, were they?

A. No, different times.

Q. Different dates?

A. Yes, sir.

The Court: Anything else now, Mr. Hartfield?

[fol. 157] By Mr. Hartfield:

Q. What did they do with the tops, they kept them?

A. I suggesfed that they keep them.

The Court: Well, did they take them out of your office, or leave them there?

The Witness: They took it with them. They took the tops with them.

Mr. Hartfield: That is all the questions I have.

Mr. Spieler: That is all.

The Court: Anything else, Mr. Spieler?

Mr. Spieler: No, that is all, your Honor.

ORDER DENYING MOTION TO SUPPRESS EVIDENCE

The Court: Is that all the testimony you intend to offer in connection with this motion to suppress?

Mr. Spieler: That is right, your Honor.

The Court: All right, motion denied.

Mr. Spieler: Exception.

The Court: I believe the statements of the witnesses called by the Government.

Mr. Spieler: You mean you are basing it on a voluntary consent rather than to have the search?

The Court: I say, on the testimony of the Government's witnesses. There has been no showing that the defendant refused to permit them to go in the office, that in fact the testimony shows that he consented.

Mr. Spieler: Well, that is what I asked.

The Court: Yes, that he consented, that the examination was on his consent. I don't believe his testimony, in other words. This woman here, Miss Steele, you know, she ap-
[fol. 158] parently was a reluctant witness, but her testimony clearly shows what her instructions were and what the practice was.

And then, too, you know, the OPA, when they approached this place, at least when they approached your client and asked him about the coupons, or asking that he disclose to them a record that he was supposed to keep, and he was supposed to have the coupons that would correspond to the gasoline which had been sold from the tanks, they were entitled to ask to see those coupons. They were part of the records. He was not permitted to keep those coupons. He was required under the regulations to turn them in when he purchased more gas from wholesalers. Isn't that the fact?

Mr. Spieler: But not to the agents; to the supplier.

The Court: Yes, and the supplier would turn them in.

Mr. Spieler: To the OPA.

The Court (Continuing): To the OPA, so that was the course. They were issued to the motorist. The motorist turned them over to the retailer when he got the gas; the retailer turned them over to the wholesaler when he got gas from the wholesaler, and the wholesaler turned them over to the OPA. I suppose in order to get an allotment of gas or in order to be permitted to acquire a certain amount of gas——

Mr. Spieler: Yes, but——

The Court: —so that these records were records that the agents were entitled to see. He had given them the key to examine the coupons that were in the boxes. He admitted that himself. Now according to their testimony he did, of
[fol. 159] course, try to hold out and prevent them from seeing the balance of the coupons or the records in his office, but eventually they persuaded him that it would be a better thing for him to permit them to examine them.

Mr. Spieler: Your Honor, just a little duress I would call it.

The Court: No, not a little duress. They talked him into it.

Mr. Spieler: May I point something out, your Honor?

The Court: Yes.

Mr. Spieler: They did not go up there for the purpose of making any inspections. They went up there to try to do exactly what they did: To get an employee to violate the law—a perfect case of entrapment if I ever saw one.

The Court: Well, I am not trying the issue of entrapment.

Mr. Spieler: Well, based on that so-called arrest, they claim they had a right to search.

The Court: No, no, Counselor. I am not trying the issue of entrapment now. That is an issue for the jury, isn't it?

Mr. Spieler: Well, I am not raising that for the jury. I am raising it on the question of whether they had a right to search the premises. They had no warrant of arrest. They had no search warrant. They say because somebody violated the law there they had a right to make an arrest.

The Court: Counselor, you haven't mentioned the word "entrapment" until this minute.

[fol. 160] Mr. Spieler: Well, the evidence is very clear.

The Court: It is not.

Mr. Spieler: That she was entrapped, if ever there was an entrapment.

The Court: No, no, not according to the legal definition of the term "entrapment." It is true that they went there expecting that she would do just what she did, namely, sell them gasoline without getting coupons and charge them over the ceiling price for that accommodation, and that is what happened. Now that isn't entrapment. It isn't entrapment for an agent of the Government to go to a suspected dealer, and with reasonable ground for believing that an illegal practice has been pursued at the gas station, to then attempt to buy gas in that manner. That is not entrapment.

Mr. Spieler: That is the sad part. There was no evidence other than suspicious circumstances caused by an anonymous letter. If that is evidence, then nobody is safe.

The Court: Well, Counselor, you did not go into the question of what evidence they had or what evidence they did not have.

Mr. Spieler: Well, Fitzpatrick said——

The Court: And apparently they went there in considerable force. There were five of them. There were two detectives and three agents, and they watched the place for some time. Sussman says he went there at 11 o'clock in the morning and the purchase was not made until—what was it, around 1—between 1 and 1.30?

Mr. Spieler: Yes.

[fol. 161] The Court: And they took the precaution to mark the money that would be used. So evidently they expected that the gas pump attendant would do just what she did, and they were getting ready to make an arrest. Now of course that is permissible. It is permissible for a Government agent to obtain evidence in that way where there are reasonable grounds for suspecting that this illegal traffic was taking place at the station. Now you may try that issue, if you wish, before the jury.

Mr. Spieler: May it please your Honor——

The Court: But on this motion, as I have already stated, I am of the opinion that what happened was that this defendant handed over the keys, as he said he did, and they examined the gas coupons in the boxes at the pumps, and then they took the rods and measured the gas in the tanks, and they did a lot of calculating and they came back to him and they said, "You are short," and they asked to see the coupons for the shortage. Then he did not want to open the door, and he says—he admits that he gave the key——

Mr. Spieler: To Payne.

The Court: —to this man Payne.

Mr. Spieler: And told him to hide it.

The Court: And told Payne to hide it.

Mr. Spieler: Which is a clear indication that he did not want them in there.

The Court: At the time, there is no question about it. One of the agents says that he saw that and so he had the other agent, Pearman, follow Payne. Apparently he got Payne to turn over the keys.

[fol. 162] Now the defendant evidently listened to Fitzpatrick and was persuaded by him to open the door and to show what records he had there in the way of coupons, just as later on, according to his own statement, Fitzpatrick persuaded him to come back and have a second talk with Burchill after Burchill had told Fitzpatrick to lock him up.

That is all right. Burchill evidently expected to get some help from this defendant because he told Fitzpatrick to let

the defendant go home, and I suppose Burchill was disappointed, and then thereafter they pressed the charge.

All I have to determine is whether or not this defendant's constitutional rights have been violated. That is the point you make.

Mr. Spieler: That is right.

The Court: Under the fourth and fifth amendments.

Mr. Spieler: Is your Honor taking into consideration that a violation was committed by an employee, and from the standpoint of the Government's proof there is no proof that this defendant had knowledge of it or authorized it, other than a very doubtful statement, which has not been corroborated by Miss Steele, that he, the defendant, was confronted by Miss Steele after the sale and she said, "Yes, I made these sales with the consent and knowledge of this defendant." She says she does not even remember anything like that taking place.

The Court: I know, but she says the same thing on the stand, that what she did was at his direction, that he told her to charge an extra 20 cents a gallon.

[fol. 163] Mr. Spieler: Well, is that binding on him, the fact that she did something without him being present?

The Court: It is evidence, Counselor. Now whether or not it is sufficient to convict him, that is for the jury to decide; but on this motion I think it is clear that this illegal practice had prevailed at the defendant's gas station, which, by the way, was owned by a corporation——

Mr. Spieler: Well, they have a right to claim——

The Court: —of which he was the president.

Mr. Spieler: They had the same privilege to claim unlawful search. The Ge-Bart case covers that.

The Court: Yes, but the gas station was run by a corporation. This man was the president, and he had employees. Apparently it was a big place. He did not operate these pumps himself. This woman said that she had been engaged in this practice for about three weeks prior to that occasion when the agents came in, and here is the card on which he made the calculations, not merely the sales to these agents but there is another sale calculated there, too.

Mr. Spieler: Well, is that binding on us?

The Court: Is it your contention or is it your client's contention, which I suppose you would express, that this was just a little private racket, as they say, of her own by which she collected the extra 20 cents a gallon?

Mr. Spieler: May I answer that by saying I am not in a position to make that accusation, but I will say that that is not beyond the realm of possibility. It has been heard of before.

The Court: Well.

[fol. 164] Mr. Spieler: And now we are bound by what she says? She makes calculations and she says we did it and we are supposed to have known about it?

The Court: I know, but there are all these coupons, sheets of them, and then this private practice that this man has set up. He was issuing his own coupons.

Mr. Spieler: Well, those are receipts, not coupons.

The Court: Well, just the same the customer would come in, and they weren't limited to any particular person. The name of the customer wasn't on them. Apparently they were transferable by delivery. Anybody could drive in with one of those things and hand it in.

Mr. Spieler: May I point out one thing——

The Court: It was like a private bank note, I suppose, when banks used to issue their own currency.

He was issuing his own coupons that would be honored at this place.

Mr. Spieler: May I point out one thing, that the statute specifically says that unless he has these coupons as an agent of the person who was entitled to them, he is guilty of an offense. I can give him my coupons and if I am violating a regulation, well, that is just too bad for me, but he is not committing any criminal offense because I decided to give him all my coupons so whenever I come in I can get gas.

The Court: No, but if he lets you have gas on coupons that are not current, not usable——

Mr. Spieler: This is not a crime, your Honor. They can suspend him.

The Court: And if he takes your coupon and he gives you one of these receipts he is indulging in an illegal prac-

[fol. 165] tice because he is not supposed to take your coupon except for gas, and you are not supposed to get the gas unless you give the coupon. In other words, the regulations say that the transaction is—it is a simultaneous pair of transactions: The giving up of the coupon by the purchaser and the payment of the ceiling price, and the delivery of the gasoline by the garage owner or gas station owner. Of course, since he knows he must get the gas cou-

pon in conducting his business honestly, he will ask for the coupon as they do invariably, I think, in garages that are operated according to the regulations. You can't get gasoline unless you first show your coupon.

Mr. Spieler: May I point out to your Honor that they have what is known as a bailing-out system, and one of the questions asked in their form is, "How many customers owe you coupons for gas which you delivered," in other words, on a credit basis. It is not a crime to give a man your coupons if you get them legally. It may be a technical violation of a regulation but it is not a crime.

Mr. Hartfield: I object. It is a crime by the statute.

Mr. Spieler: I would like you to show us where the statute says that if I get coupons from the owner whether I am guilty of a crime.

The Court: No, it is a violation of the regulations that you received the coupons other than in a transaction whereby you deliver the gas.

Mr. Spieler: (To Mr. Hartfield) You can't find that.

[fol. 166] The Court: Mr. Hartfield just handed the regulations up to me about a half an hour ago.

Mr. Spieler: I am sorry to say it doesn't say that at all.

The Court: Well, read it. Show it to him.

Well, we don't need to go into that, Counselor. You show it to Mr. Spieler later.

The motion to suppress the evidence is denied.

Mr. Spieler: Exception.

The Court: Now we will go on with the trial tomorrow at 10.30 o'clock.

(Adjourned to March 8, 1945, at 10.30 a. m.)

[fol. 167] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S REQUESTS TO CHARGE

1

The defendant is presumed to be innocent and this presumption has the weight and the effect of evidence in his behalf, and it continues to operate in his favor until it is overcome by competent evidence; and, if the evidence introduced by the Government does not overcome this presump-

tion of innocence to your satisfaction, to a moral certainty and beyond all reasonable doubt, your must find the defendant not guilty.

2

You should begin your deliberation as jurors in a conscientious effort to give an innocent explanation to the acts of the defendant instead of a guilty one.

[fol. 168]

3

Where the acts of the defendant may be given either an innocent or guilty construction, the jury is duty-bound to give such acts the innocent construction rather than the guilty one.

4

It is not necessary for the defendant to prove his innocence, but the burden rests upon the prosecution to establish every element of the crime with which he is charged, and every element of the crime must be established to a moral certainty and beyond all reasonable doubt. If the prosecution failed to establish to a moral certainty and beyond all reasonable doubt any one element of the crime with which the defendant is charged, and which it is necessary to establish in order to convict, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any element constituting the crime to a moral certainty, and beyond all reasonable doubt, then you must find the defendant not guilty.

5

To warrant a conviction on circumstantial evidence each fact necessary to the conclusions of guilt must be proved beyond a reasonable doubt, and all the facts so proved must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken all together, must be of a conclusive nature and producing in [fol. 169] effect a reasonable and moral certainty that the accused committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to create and justify full belief according to the standard rules of certainty. It is not sufficient that they coincide with and render probable

the guilt of the accused. The facts so proved must be incompatible with innocence and incapable of explanation upon any other reasonable theory than that of guilt.

6

Every defendant is entitled to the individual opinion of each juror as to his guilt or innocence. Each juror must adhere to his own individual opinion concerning the guilt or innocence of the defendant, and once a juror entertains a reasonable doubt concerning the guilt of the defendant, it is the duty of such juror to adhere to such opinion. But the jurors in the performance of their duty to arrive at the truth should freely and fully discuss with and amongst each other the question of the guilt or innocence of the defendant. But if, after such discussion, a juror still entertains a reasonable doubt as to the guilt of the defendant, it is the duty of such juror to vote as to the defendant for a verdict of not guilty. When a juror entertains a reasonable doubt of the guilt of the defendant, such opinion must not be relinquished by such juror merely because a number of other jurors, or even the majority of other jurors, disagree with him.

[fol. 170]

7

The Government has introduced evidence that the defendant on various occasions authorized or knew about the sale of gasoline at prices in excess of the maximum prices authorized by law. The jury is instructed that the defendant is not charged with the crime of selling gasoline in excess of the prices authorized by law. The jury is therefore instructed that they may not consider this evidence as proof of the guilt of the defendant for the crime charged in the information.

8

If the jury should find that the gasoline ration coupons found in the possession of the defendant were left with the defendant by customers of the defendant and for their benefit, then the jury must return a verdict of not guilty.

9

Certain witnesses for the Government have testified as to certain admissions made by the defendant. The jury

is instructed that the defendant can not be found guilty upon proof only of these admissions. The Government must in addition to the admissions adduce evidence which will establish beyond a reasonable doubt the defendant's connection with the crime charged in the information. If therefore the jury should find that there is no evidence except the admissions connecting the defendant with the crime charged in the information, then they must return a verdict of not guilty.

[fol. 171] 10

Where the jury finds that a witness has falsified his testimony on any material fact, they are at liberty to disregard the entire testimony.

11

The jury is cautioned to scrutinize the testimony of Vivian Steele and Lawrence Feldman with great care. Too much reliance should not be placed upon the testimony of accomplices and before giving any credence or weight to the testimony of accomplices, the jury should be first satisfied that there has been corroborating testimony, *Holmgren* v. *United States*, 217 U. S. 513; 30 Sup. Ct. 588; *Rossi* v. *United States*, 9 Fed. (2d) 362, 366.

12

Corroborating evidence is such evidence which is independent of the evidence of accomplices and which in and of itself shows not only that a crime has been committed, but that the defendant is implicated in it. *United States* v. *Murphy*, 253 Fed. 402.

Respectfully submitted, Irving Spieler, Attorney for Defendant.

[fol. 172] In United States District Court

Charge of the Court

Leibell, *J.*

The Court; Now, Jurors, you have patiently listened to the testimony of witnesses and you have seen exhibits offered in the course of the trial of this case. And, as I told you when you were being selected, our functions are divided; you are the sole triers of the facts and the Judge

passes upon the questions of law that arise—motions, questions of admission of evidence and the like—and then at the end of the trial the Judge charges the jury, as they say. That is, he explains to them the general legal principles that apply to the trial of a criminal case in this court and he also explains to them what the charge is in the indictment or the information and what statutes of the United States are alleged to have been violated by the defendant. That is my function at this time. I may refer to some of the testimony in the case, briefly refer to it, but a reference to part of the testimony and not to other parts does not mean that the Court has or wishes to indicate to the jury any opinion whatsoever as to the guilt or innocence of the defendant. That is your province, you have to pass upon that.

Let us see what the charge is against this defendant. When a defendant is brought into court he is entitled to know what offense he has committed according to the Government, and so that offense is set forth in a legal paper that is filed with the clerk of the court, and the defendant may obtain a copy of it. In this case the legal paper is what is known as an information. It was not an indictment by a grand jury. The charge here is a misdemeanor. So, the District Attorney may proceed by way of an information instead of an indictment if he submits to the Court the information setting forth the charge [fol. 173] against the defendant and if the Court endorses on the back of it the notation "Leave to file within information is hereby granted," and he puts his name on it. The Government may present evidence to a grand jury and obtain an indictment; then, of course, the indictment is signed by the foreman and is filed by the Court with the clerk of the court.

In this case we are proceeding on this information which was filed with the clerk of the court February 26, 1945—that is since the first trial—and as filed it contained four counts. Before the taking of testimony in the case the Government moved to dismiss two of the counts, the second and fourth, and the trial proceeded on the first and third counts. Why the Government moved to dismiss those counts is not any concern of yours. You are merely to pass upon the question of the guilt or innocence of the defendant on the two remaining charges, the charge in Count 1 and the charge in Count 3.

It appears that the charge in Count 1 was also the subject of another trial, and counsel referred to the fact in their summation, and I think it may have come out in the course of the trial—I believe it did—that there had been a trial on the first count, the subject matter of the first count, and the jury disagreed. All right; the Government has the right to try the case over again on that count. You do not know what evidence was before that jury. You are told that there is certain additional evidence before this jury. But that should not influence you at all, what another jury may have done with the evidence it had before it in connection with this Count 1. You consider only the evidence that has been before you on that Count 1.

[fol. 174] As to Count 3, of course, that was never tried before. That is the count relating to the alleged sale of 300 gasoline ration documents of the type denominated E to Lawrence Feldman by the defendant on August 4, 1944.

We have all heard and read in the newspapers about the OPA, the Office of Price Administration, and the like. As I told you when you were selected, you do not start the trial of a case, you should not be received as jurors or sworn as jurors, if you begin with a prejudice one way or the other; you do not decide a case because you do not like the looks of a defendant, you do not like the business he is in; and you do not decide a case because you do not like the OPA or some of its regulations. You consider the evidence as a serious matter. You are part of the administration of justice when you sit as jurors. You take an oath just as I have taken an oath as a judge; the lawyers take their oaths too, you know, when they are admitted to practice in the court; and every witness who takes the stand is sworn; and the documentary evidence goes in either through the testimony of a witness who properly identifies it, and the like, or by concession of counsel—in other words, it has the sanction of an oath, too.

So we keep the plane of our proceedings above the ordinary and we support all that is done with the sanctity of an oath, and you support your verdict with the sanctity of your oath; and there are 12 of you, and there have been 12 jurors as the common law requirement for a jury for generations. I will refer later to the fact that when you go to the jury-room you exchange views and that any verdict you arrive at must be a unanimous verdict; that is, it can't be a verdict on a 10 to 2 or 9 to 3 vote or anything like that. The verdict

[fol. 175] of a jury must be a verdict of the jury collectively and of each juror separately. You understand that, I am sure. You see, some of the courts in civil cases now permit a verdict by less than a unanimous vote of the jurors, but not in criminal cases.

What is the charge here? Well, I need hardly repeat it but I am going to refer to the language of Count 1 to refresh your memory on the exact wording of the charge. I called it to your attention when you were being considered as jurors. Here is the charge in Count 1:

That on or about the 20th day of June 1944 at the Southern District of New York and within the jurisdiction of this Court—and of course the Borough of the Bronx, County of the Bronx, is within the jurisdiction of this Southern District of New York—Jack Davis, the defendant herein unlawfully, wilfully and knowingly did have in his possession and control approximately 168 gasoline ration documents of the type denominated A in sheet form representing approximately 504 gallons of gasoline, said defendant being then and there not the person or agent of the person to whom said ration coupons were issued or by whom they were acquired in accordance with Ration Order No. 5-C and General Ration Order No. 8 duly issued by the Price Administration, against the peace of the United States and their dignity and contrary to the statute.

So you see, referring now to the evidence in the case and the statements of counsel in your presence, the charge against the defendant Davis under Count 1 relates to the possession of these seven sheets of stamps marked Exhibit A—not those pasted on what they call the bingo sheets, but those that were not pasted on anything; in a block, as it were, three rows in a block. I think they added them [fol. 176] up and they totaled about that, 167, or 168 stamps, for a total of 504 or 501 gallons, whatever it may be. Each stamp was good for three gallons at that time, in June 1944.

What is the law on it? Well, you know we got into a war without any affirmative act of our own; we found we were in a war Sunday, December 7, 1941. And then Congress passed some legislation in June 1940 to expedite the national defense, and for other purposes, and that Act was amended on May 31, 1941. I am reading now from Section 633 of Title 50 of the United States Code and under

the heading "Priority Powers," Section 2-A, subdivision 2, there appears this:

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

Of course, the President could not exercise all these powers through himself alone, so these powers were properly delegated; and the powers to ration, as they say, now or control the civilian use of many commodities, including those headed "Fuel" of which gasoline would be a subdivision, were by executive order passed on until they were lodged with the Office of Price Administration. With those powers the Office of Price Administration was authorized to issue what are called "regulations," and of course they related to the conduct of business in so many industries, so many different items, that they developed separate [fol. 177] regulations for the different branches of industry. And in one of them headed "Rationing of Fuel and Fuel Products" there were regulations that dealt with the purchase and transfer of gasoline. Under Section 1394.-8153 headed "Transfer to Consumers in Exchange for Coupons, Ration Checks and Gasoline Purchase Permits and Coupons and Books Issued for Registered and Commercial Motor Vehicles. Transfers may be made and accepted in exchange for coupons contained in Class A, B, C, D, T-1, or T-2 books only under the following conditions:"

And here is the provision:

"At the time of transfer the transferor"—that would be the retail man who runs the gas station—"must require presentation of the coupon book and must detach therefrom coupons having an aggregate unit value equal to the amount of gasoline transferred, provided that if the transferee"—that is the motorist—"is able to accept only a portion of the amount of gasoline represented by the unit value of the coupon"—that is to say, if his tank is full before a full coupon is used—"the transferor shall nevertheless detach

an entire coupon. No transfer shall be made pursuant to this paragraph in exchange for a coupon detached prior to the presentation of the coupon book to the transferor."

And then subdivision 2 of the regulation says:

"Transfer may be made only into the fuel tank of a motor vehicle identified on the coupon book presented and only if the sticker corresponding to the class of book presented is conspicuously displayed on such vehicle, as required by the provisions of" subdivision so and so of the regulation.

[fol. 178] Section 3 contains in part the following:

"Transfer may be made only on and after the validity date noted on the cover of the book presented, or in the case of a Class A book only during the period of validity of the coupon in exchange for which the transfer is made."

You have heard some testimony as to the period during which these various A coupons were current or effective—valid—and could be used in the purchase of gasoline. I think the testimony was that in June of 1944 the A10 coupons were current and that they remained current until some time in July, perhaps it was the end of July 1944; and then the A11s became current and they were good until some time in November, at which time the A12s were not declared current but they were called for, cancelled, and a new book was issued or a new system of stamps was initiated at that time, so that the A12s never became current.

The A11s did became current some time in July and the A10s were current in June 1944. Those are the principal parts of the regulations that have to do with the matter in hand.

Let us see what the charge is. The Government says that this defendant illegally possessed these coupons (Exhibit 4), the seven sheets with the stamps in block, that he had not obtained them lawfully, that is to say, he had not obtained them in exchange for cancellation.

The agents who were at the defendant's place of business a good part of the day, June 20, 1944, have testified as to what they saw there, what transpired; how there were two transactions they claim they had with this witness Vivian Steele, the gas station attendant. And I think it was Mr. Sussman who testified that when he told her to

[fol. 179] fill up the tank he said he did not have any stamps, but at any rate whether he said that in advance or disclosed that fact later, she filled the tank, and then in charging him she charged him for the number of gallons, 11.8 gallons, shown on the automatic register of the tank, at 21 cents a gallon which, as you know, was calculated automatically on the tank on another line; that she then took a slip of paper or cardboard—it is one of the exhibits, and it is cardboard—and on it she made a calculation, so many gallons, 11.8, times 20 and charged an additional $2.30, I think it was, 20 cents a gallon extra, because the purchaser did not present coupons.

Then the other agent, Mr. Pearman, says that he went in after that and he purchased five gallons, that he was charged $1.05 plus a dollar, the extra 20 cents on each gallon of the five, and that he paid $2.05. And this gas station attendant testified that where the calculation was easy like that, 5 times 20, she did not need to use this cardboard, but she did use it when she was figuring gallons that came out to decimal points like this 11.8 purchase.

Well, the agents say that they later came over after the purchases were made and they said the witness Steele made certain admissions to them as to why she did this, why she was following a practice. She has testified here, pursuant to subpoena—and you will recall her testimony, I am not going to discuss it—and she claimed there was a practice that she was told to follow in cases of purchasers who did not have stamps, that is, they were to pay 20 cents extra.

The Government therefore contends that, since sales were made without stamps being presented, the defendant in order to stay in business had to get stamps for such [fol. 180] sales; if he did not get them from the motorists who purchased the gasoline he would have to get them from some other source in order to stay in business and replenish his supply, because when he bought from a wholesaler a new allotment of gasoline he had to deliver up a corresponding number of stamps that he had received from motorists for the sale of gasoline that the new purchase was to take the place of. That was the system. And, of course, if the gas was sold without getting coupons from the motorists, why, then, coupons would have to be obtained from some other source. The Government claims that these seven sheets were coupons thus illegally possessed by the

defendant Davis, that they were not coupons that had been obtained from motorists to whom gasoline was sold at his station.

Mr. Davis has taken the stand and he has testified in his own behalf, and he has produced certain witnesses here, and he says that he had a certain practice by which he would receive from known customers a whole sheet of stamps and issue to them certain slips—some two of them are in evidence—showing that on presentation they would receive at Davis's gasoline station so many gallons of gas. And there has been the testimony of Mr. Stapleton and Dr. Spindel as to what they did in that regard.

There is an issue of fact presented. You know what the Government's contention is, you know what the defendant's contention is. The defendant accounts for the possession of these seven sheets (Exhibit 4) by saying that he received them from known customers and against them he in turn issued these little white slips that they could cash in for gasoline at his station. He also states that no gasoline was ever sold at his station to his knowledge without the [fol. 181] coupons or these little white slips being delivered to the agent or the attendant at the gas pump at the time the sale was made. You weigh the testimony.

The Government claims Davis made certain admissions before Mr. Burchill. Mr. Burchill has testified. Detective Fitzpatrick testified that he was present when an admission was made before Mr. Burchill. You weigh all the evidence, you determine the questions, the issues of fact, and you pass upon the credibility of the witnesses. That is your particular function.

As to the charge in Count 3. It is short. It says that: "Heretofore, to wit, on or about the 4th day of August 1944 at the Southern District of New York and within the jurisdiction of this Court Jack Davis, the defendant herein, did unlawfully, wilfully and knowingly transfer approximately 300 gasoline ration documents of the type denominated E to Lawrence Feldman, against the peace of the United States" et cetera, and refers to Section 633 of the statute, to which I have just referred, as the statute that was violated.

You have heard the testimony on that. Feldman was here, he took the stand and he told his story. The defendant has taken the stand and he told his story.

You may wonder why a man would come and make a charge of that kind against another. The defendant says, well, Feldman had been arrested when he had these coupons and in order to save himself he said he bought them from Davis; and Davis said that he did that because some eight years ago they had had a row, apparently a fight, and that they were on bad terms. Feldman says that he used to have his car washed there and that he was in the same [fol. 182] line of business, a very similar line of business, and that Davis on this particular day asked him if he would be interested in purchasing some E stamps and that an arrangement was made by which Davis was to deliver these stamps away from the gas station, but Mr. Feldman paid Davis in advance $60 for these stamps totaling 300 gallons. You have heard the testimony of Feldman and the testimony of Davis. Davis denies it and he charges that Feldman is inspired by animus in his testimony. Well, you weigh the evidence. You reach your own conclusions. You have to pass upon the credibility of witnesses.

So much for the reference to the nature of the charge and some of the testimony. As I told you, you use your own recollection as to what the testimony is and if you reach a point in the course of your discussions where you have any doubt as to what the testimony of a witness was, if there is any difference of opinion among you as to what a witness testified to, you of course have the right to request the Court to have the stenographer read to you in open court—you will be brought back to your places in the jurybox—that particular part of the witness's testimony. You also in the juryroom may have before you any of the exhibits that you request. All you need is to have the foreman write out a request for this exhibit or that exhibit, and if you do not know the number just describe what it is, and we will pick it out and send it in, and if it is not what you want send in another note and say, "No, we intended it for this exhibit." In that way you may have sent in to you any or all of the exhibits that have been received in evidence in the course of the trial of this case.

As to some of the general principles that apply in the trial of all criminal cases in this court, you notice that the [fol. 183] Government started with the presentation of the evidence. The Government has the right to open first before you; the assistant District Attorney made the opening statement and he made the closing statement. The

Government offers its proof first because there is imposed upon the Government the burden of proving the guilt of a defendant in a criminal case beyond a reasonable doubt. What does that mean? Well, the words "reasonable" and "doubt" are the answer, they contain the answer. A reasonable doubt is a doubt for which you can show a reason or for which you have a reason; a reason that is supported by the testimony of a witness or some exhibit or by the absence of some proof on some material fact. So, a reasonable doubt then is not an imaginary doubt and of course it is not a doubt that any juror would conjure up in order to avoid performing what might appear to the jury to be an unpleasant duty. A reasonable doubt means just what the words indicate—a doubt for which there is a reason. The Government does not have to prove the guilt of a defendant beyond all possible doubt but only beyond a reasonable doubt.

Every defendant begins the trial of a criminal case with a presumption of innocence and that presumption remains with the defendant throughout the trial and down to the point in the course of the deliberations of the jury when the jurors, if they do so conclude, reach the conclusion that the guilt of the defendant has been established beyond a reasonable doubt. You see, that is our system of law. The defendant is shielded and protected. A burden is placed upon the Government as to the nature of the proof, that is, the Government must show the guilt of the defendant beyond a reasonable doubt and then, too, a defendant begins the trial of a case with the presumption of innocence and [fol. 184] that presumption remains with him throughout the trial down to the point in the jury room where the jurors may be satisfied beyond a reasonable doubt of the defendant's guilt.

Of course, as to any particular act or transaction, if the evidence in relation to it permits of two inferences, one of which would suggest or imply the guilt of the defendant and the other his innocence, why, then, of course you must give it the interpretation that would support the innocence of the defendant. You give it that construction.

We have in the law what are known as accomplices. Who is an accomplice? An accomplice is one who is in some way concerned in the commission of a crime. The witness Steele would be an accomplice, the witness Feldman would be an accomplice. Any other witness who may have taken

the stand for the Government, if you find that he was, as the law says, concerned in the commission of the crime and involved in it, a party to it, then of course that witness would be classified as an accomplice.

The testimony of such a person, an accomplice, in connecting others with the crime charged should be viewed with a certain degree of caution and weighed carefully, and it is preferable that there be some corroboration of a substantial part of the accomplice's testimony. The extent to which there has been such corroboration, if any, is for the jury to determine. However, corroboration is not a necessity, and a defendant may be convicted under our law on the uncorroborated testimony of an accomplice if the jury believes such testimony and it establishes in the minds of the jury the guilt of the defendant beyond a reasonable doubt.

I have told you I think, at least I mentioned it when you were being selected as jurors, that the filing of an information in the case against a defendant raises no presumption [fol. 185] of guilt. It is merely the method provided by law pursuant to which the defendant is informed of the nature of the charge against him, so that the Court knows what the issues are and the jury will know what the charge is. That paper is filed and the filing of it raises no presumption of guilt against the defendant.

Under our system of law there is no burden placed upon the defendant to prove his innocence. A defendant does not even have to take the stand in his own defense, but if he does you scrutinize his testimony in the way you would the testimony of any other interested witness, and of course a defendant would be an interested witness. You may consider that fact in weighing the testimony of a defendant.

If you believe that any witness has deliberately testified falsely as to any material fact you may, if you see fit, disregard all of that witness's testimony or you may do what we frequently do in every day life, believe and consider that part of the testimony that you think was truthful and disregard any part of it that you may believe was untruthful.

I have told you that the verdict of the jury must be a verdict of each juror. There are 12 of you, so you may exchange views. That does not mean that one juror holds the floor all the time. You do not deliberate when one juror does all the talking. You may express your views with your fellows and of course it is your duty, in turn, to listen

to their views. You do not sit in the corner and say, "I have made up my mind, that is all there is to it." No, you do not fulfil your duty as jurors or satisfy your oath in that way. You are supposed to deliberate and exchange views and do it quietly. Do not get excited. I always tell the jurors, the more heat the less light. Exchange your [fol. 186] views, weigh the evidence, and then if you can arrive at a verdict.

Of course, your verdict would be a verdict as to each of those counts, Counts 1 and 3, and it would be a verdict that the defendant is guilty or not guilty on Count 1 and then a verdict that the defendant is guilty or not guilty on Count 3. You weigh each count separately and the evidence in relation to it because the two counts are separate offenses. You may find him guilty if you are satisfied by the evidence beyond a reasonable doubt of the guilt of the defendant, on Count 1 and yet find him not guilty on Count 3, or of course you may find him not guilty on both counts. So that you consider each count separately—that is the thought I am trying to get to you—and your verdict as to each count would be the verdict of either guilty or not guilty.

Now, Counsel, I have considered the requests submitted by the defense counsel. I think I have covered most of them in the charge. If there is anything special you wish to call to my attention you may come to the bench and do it.

Mr. Spieler: May I refer to the number? I am not going to read it.

The Court: Yes.

Mr. Spieler: No. 7, I don't think you touched on that, your Honor.

The Court: Well, I won't charge it in that language.

I will charge, of course, that the defendant is not on trial for selling gasoline in excess of the price authorized by law, the ceiling price. That is not a charge against him. The charge against the defendant is the illegal or the unlawful possession, according to Count 1, of 168 gasoline ration documents denominated A representing approxi- [fol. 187] mately 504 gallons. The testimony as to these other things, as to the alleged sale without stamps, is something that in the minds of the jury may have some bearing on the possession of this block of stamps or it may not. It was admitted because the jury might consider it material. And, of course, the charge is not that the defendant sold

in excess of the ceiling price. That is not the charge. Count 1 is clear.

Mr. Spieler: Will your Honor please charge Nos. 8 and 9?

The Court: Well, I have already covered the question of reasonable doubt mentioned in request 9 and I think I have told the jury they must weigh all the evidence, consider all the evidence in the case in determining the guilt or innocence of the defendant. And except as I have already covered it in my charge, 9 is refused. You have an exception.

Mr. Spieler: Thank you.

The Court: As to No. 8, if the jury finds that the gasoline ration coupons were, pursuant to the regulations that I have referred to, lawfully left with the defendant by customers and that they were in the possession of the defendant pursuant to the practice established by the regulation, then of course the verdict of the jury would have to be a verdict of not guilty.

Anything else?

Mr. Spieler: That is all, your Honor.

The Court: Has the Government any requests?

Mr. Hartfield: I have one, your Honor. Shall I approach the Bench?

The Court: Yes.

[fol. 188] (Mr. Hartfield approached the bench and spoke to the Court out of the hearing of the reporter and the jury.)

The Court: Now, Counsel, have you any exceptions to the charge? You must take them before the jury leaves the room, you know.

Mr. Spieler: I haven't any exception, your Honor.

The Court: All right. If you wish to have a copy of Count 1 and Count 3, we will cut them out separately and send them in to you from a copy, not from the original, because there is no need of you reading what the charge was in Count 2 or Count 4; you have only Counts 1 and 3 before you.

Swear the deputy marshal.

(Officers were sworn.)

The Court: Now, Jurors, you will retire to the juryroom and begin your deliberations. Any of the exhibits you want, just write a note.

(Whereupon at 4.40 p. m. the jury retired.)
(At 6.00 p. m. the jury returned to the court room.)

The Court: All right, Mr. Clerk, call the roll.

(The clerk called the roll.)

The Clerk: Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How say you?

[fol. 189]

VERDICT

The Foreman: We find the defendant guilty on Count No. 1 and not guilty on Count No. 3.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. You say you find the defendant guilty on Count 1 and not guilty as to Count 3, and so say you all.

The Court: Do you wish the jury polled?

Mr. Spieler: Yes, if your Honor please.

(The jury was polled.)

The Court: The motions now.

MOTION TO SET ASIDE VERDICT

Mr. Spieler: I move to set aside the verdict on the grounds that it is contrary to the evidence and contrary to the law and on all the other grounds.

The Court: Denied.

Mr. Spieler: Exception.

[fol. 190] IN UNITED STATES DISTRICT COURT

SENTENCE

UNITED STATES

v.

JACK DAVIS

Before Hon. Vincent L. Leibell, District Judge

New York, March 23, 1945.

The Court: The sentence of the Court in the case of Jack Davis under the first count of this information C. 119-424 is as follows:

The defendant shall be confined for six months in jail and he is directed to pay a fine of $1000 and he shall stand committed until the fine is paid.

[fol. 191] IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

C. 119/424

Violation of U. S. C. Title 50 Sec. 633

Unlawful possession of gasoline ration coupons

[Same Title]

JUDGMENT AND COMMITMENT

On this 23rd day of March 1945, upon the proceedings heretofore had herein and on motion of the United States Attorney, It is by the Court

Ordered and Adjudged that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of

Six Months & Fined $1000

Defendant to surrender March 26, 1945. Bail continued.

It is Further Ordered that defendant stand committed until fine is paid or he is otherwise discharged by due course of law.

It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Vincent L. Leibell, United States District Judge.

[fol. 192] In United States District Court, Southern District of New York

[Same Title]

Notice of Appeal and Grounds of Appeal

Name and Address of Appellant: Jack Davis, 882 Bryant Avenue, Bronx, N. Y.

Name and Address of Appellant's Attorney: Irving Spieler, Esq., 475 Fifth Avenue, New York.

Offense: Unlawful possession of gasoline ration documents in violation of Ration Order No. 5-C and General Ration Order No. 8, Title 50, Appendix, Section 633, United States Code.

Date of Judgment: March 23rd, 1945.

Brief Description of Judgment or Sentence: The Appellant, Jack Davis was sentenced to imprisonment for a period of six months and was fined the sum of $1,000 to stand committed until the fine is paid.

[fol. 193] Name of Prison Where Now Confined if Not on Bail: Appellant not confined. Out on bail until March 26th, 1945.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the judgment above mentioned, on the grounds set forth below.

Dated, New York, N. Y., March 23rd, 1945.

Jack Davis, Appellant.

[fol. 194] Grounds of Appeal

1. The Court erred in denying the motion to suppress evidence obtained on June 20th, 1944, by reason of an unlawful search and seizure.

2. The Court erred by denying the motion to dismiss Count one of the Information at the end of the Government's case, upon the grounds that the Government failed to prove a prima facie case.

3. The Court erred in denying the motion to dismiss Count One of the Information made at the end of the entire case because of failure of proof.

4. The Court erred in allowing evidence of alleged sales of gasoline over the ceiling prices, by Vivian Steele.

Dated, New York, March 23rd, 1945.

Jack Davis, Appellant.

[fol. 195] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

[Same Title]

ASSIGNMENT OF ERRORS

The defendant in the above entitled cause having heretofore appealed to the United States Circuit Court of Appeals in and for the Second Circuit from the judgment of conviction rendered against him on the 23rd day of March, 1945, now makes and files the following assignment of errors upon which he will rely and upon which he will apply for reversal of the judgment rendered against him.

I

The Court erred in denying the motion made at the end of the government's affirmative case and renewed at the conclusion of all of the evidence introduced in the case to dismiss the information and for a directed verdict of acquittal upon the ground that the evidence was insufficient to sustain the allegations of the information.

To the Court's order denying said motion the defendant duly excepted.

II

The Court erred in denying the motion of the defendant to set aside the verdict of the jury on the ground that the verdict was contrary to law and contrary to the weight of [fol. 196] the evidence to which ruling of the Court an exception was duly taken by the defendant.

III

The Court erred in denying the motion made by the defendant prior to the trial to suppress any and all evidence of whatsoever nature and for the return of all property seized and unlawfully obtained directly or indirectly by reason of the unlawful search and seizure of the property of the defendant, to which ruling an exception was duly taken.

IV

The Court erred in denying the motion made by the defendant to suppress government's exhibits "4" and "5", consisting of gasoline ration coupons illegally seized from the possession of the defendant and obtained as a result of an illegal search in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

V

The Court erred in refusing to suppress and in permitting the government to introduce evidence seized from the possession of the defendant on June 20th, 1944 prior to the arrest of the defendant on the ground that said evidence was obtained as a result of an unlawful search and seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

[fol. 197]

VI

The Court erred in entering judgment against the defendant upon the verdict of the jury.

VII

The Court erred in admitting into evidence, incompetent, irrelevant and immaterial testimony over the objection and exception of the defendant as follows:

A. The government was permitted to introduce the following incompetent, irrelevant and immaterial testimony upon the examination of government witness, Joseph Sussman (S. M., pp. 208-210):

1. "Mr. Hartfield: At this time I offer this Government's Exhibit 1 for identification in evidence.

Mr. Spieler: I object to it upon the ground it is not binding on the defendant Davis.

The Court: Overruled.
Mr. Spieler: Exception.

(Government's Exhibit 1 for identification received in evidence.)

A. (Continuing:) I gave the attendant the $5——

The Court: Wait a minute now.
Mr. Spieler: Excuse me. I object to any conversation between this witness and the witness Vivian Steele, not in the presence of this defendant.
The Court: Objection overruled.
[fol. 198] Mr. Spieler: Exception.
The Court: You say she put in how many gallons?
The Witness: 11.8 gallons of gasoline.
The Court: All right. Go ahead. What did you do then.
The Witness: I handed her the $5 bill, and she took from her left breast pocket a slip, a cardboard slip, and on that she marked up down there 11.8 gallons of gas, the price charged, and the overcharge.

Q. Mr. Sussman, I show you here a card marked Government's Exhibit 2 for identification and ask you if you have ever seen that card before?
A. I have.
Q. Is that the card that Vivian Steele marked the price of gasoline on?
A. It is.
Q. Did you initial that card?
A. I did.
Q. And right next to your initials, are those the figures in respect to your transaction?
A. They are.

By the Court:

Q. When did you initial the car?
A. When I took it from Vivian Steele.
Q. Was that at the time of the purchase or later?
A. No; at a later time.

The Court: What is the exhibit number on that?
Mr. Hartfield: 2 for identification.
The Court: Exhibit 2 for identification.
Mr. Hartfield: Which I offer at this time.

Mr. Spieler: I object to that exhibit being offered in evidence, not binding on the defendant Davis.

[fol. 199] The Court: We will let it stand as marked for identification."

2. "Mr. Hartfield: At this point, your Honor, I offer in evidence as Government's Exhibit 4 these sheets of coupons.

Mr. Spieler: I object to it on the ground that there has been no proper foundation laid yet for its reception into evidence.

The Court: Mark it for identification.

(Marked Government's Exhibit 4 for identification)" (S. M., p. 220).

3. "Q. I show you here, Mr. Sussman, many OPA bingo sheet forms, some with more coupons on than others, and ask you have you ever seen these before?

A. I have.

Q. Where did you get those?

A. From Mr. Davis.

Q. Davis gave them to you?

A. He did.

Q. Those are the ones that Davis gave you?

A. Yes.

Mr. Hartfield: I offer them in evidence.

Mr. Spieler: I object to it upon two grounds. In the first place, there is nothing in the information which enumerates those various coupons that he is now trying to offer. It refers to Class A coupons and nothing else.

Mr. Hartfield: These are all Class A, your Honor.

Mr. Spieler: And 168 of Class A which I presume he is referring to, the first batch.

Mr. Hartfield: That presumption isn't necessarily true.

[fol. 200] The Court: The District Attorney I suppose will in his argument later identify the stamps that he claims are covered by the first count of this information. I will receive these. The witness says he, in turn, had received them from Davis.

When I say I will receive them, we will mark them now for identification, Exhibit 5 for identification.

How many sheets are there?

The Clerk: Seven sheets.

The Court: These are what you call the bingo sheets?

The Witness: Yes, your Honor.

The Court: And they have some stamps attached to them?

Mr. Hartfield: Yes. Different amounts of stamps on each one, but all of the A variety.

(Marked Government's Exhibit 5 for identification.)

The Court: Go ahead" (S. M., pp. 221-222).

4. "Q. That is Government's Exhibit 4 for identification you are now talking about. And Davis gave these to you?

A. He did, minus that top part, which is required by law to be attached thereto.

Mr. Spieler: I object to any interpretation of the law by this witness.

The Court: Yes. Sustained.

They were given to you in that condition?

The Witness: Yes, your Honor.

[fol. 201] Mr. Hartfield: At this point I would like to offer these in evidence since they have already been introduced for identification.

Mr. Spieler: I object to them.

Mr. Hartfield: On what ground?

The Court: Yes. State your objection.

Mr. Spieler: On the ground there is no foundation for its introduction. There is no proof other than a statement from this witness that he got them from Davis.

The Court: Well, now, Mr. Hartfield, I think we should know which of the A stamps referred to—you may have the information, Mr. Clerk—which of the 168 gasoline ration coupons of the type denominated A in sheet form to which the first count of the information refers. Those on the bingo sheets or those in this Exhibit 4 for identification?

Mr. Hartfield: Your Honor, the answer to that question is ambiguous. It is my contention and I will contend later, that all of them were illegally in this man's possession. The jury can decide which ones they want to decide were illegally in his possession. I say there were at least 168, and that is all I have to prove; and I certainly can prove more than 168 if I only charge him with 168.

The Court: Are the 168 those in these sheets or on the bingo sheets?

Mr. Hartfield: Maybe your Honor didn't understand me.

The Court: Well, I think I did, but I am trying to get you to make a more definite statement.

Mr. Hartfield: Well, your Honor, then, if you want a [fol. 202] more definite statement, I couldn't go wrong in saying that we are satisfied that these are the 168 on the sheets.

The Court: That is Exhibit 4 for identification.

Mr. Hartfield: That is right.

The Court: That is what I wanted to know from you. The A stamps on the seven sheets of stamps which have been marked Exhibit 4 for identification, you say you are now offering them in evidence?

Mr. Hartfield: I do.

The Court: They are received.

Mr. Spieler: Exception, please.

The Court: Yes.

(Government's Exhibit 4 for identification received in evidence.)

Q. Now would you continue, Mr. Sussman?

The Witness: Will you tell me what the last part of my testimony was?

The Court: Suppose you put a question to the witness.

Mr. Hartfield: What was the last question?

(Record read.)

Q. Now, did you find other things in that room?

A. Mr. Davis gave me bingo sheets, OPA form R120A containing A gasoline stamps which were not valid as of that date.

Mr. Spieler: I object to that.

[fol. 203] The Court: Let us have these bingo sheets, so-called, that were marked Exhibit 5 for identification. Hand them to the witness.

(Exhibit 5 for identification handed to the witness.)

The Court: Are those the sheets you mean, Mr. Witness?

The Witness: Yes, your Honor.

The Court: All right. Now you have made a statement to which counsel has objected. You said that certain of the stamps on these sheets were not valid as of that date. I suppose you mean June 20, 1944?

The Witness: Yes, your Honor.

The Court: What do you mean by that?

The Witness: Stamps No. A11 and A12 would not become due until a few months later.

The Court: And could not be used?

The Witness: Could not be used at that time.

Q. Did A12 ever become valid?

A. No. They were cancelled altogether.

Mr. Spieler: I object to that. May I be heard on that? There is only one charge in this information, and that refers to Government's Exhibit 4, which you permitted to go in evidence. I don't think I should be bound by anything else, and we are not prepared to meet anything else.

The Court: I don't think there is any question about you being prepared to meet it, Counselor.

[fol. 204] Mr. Spieler: From the standpoint of the law, we are not supposed to be prepared.

The Court: We have been all over this before.

Mr. Spieler: That is true. But we have a right to be told what we are charged with in the information.

The Court: I will instruct the jury at the end of the trial. But these bingo sheets containing these stamps, as explained by the witness, were received by the witness at the same time that he received these other sheets from Davis on June 20, 1944, at the place of business of this Davis Auto Laundry Corporation. So these bingo sheets, Exhibit 5 for identification, are received in evidence, and your objection is overruled.

Mr. Spieler: Exception, please" (S. M., pp. 223-227).

B. The government was permitted to introduce the following incompetent, irrelevant and immaterial testimony upon the examination of the government witness, Donald Pearman.

1. "Q. Whom did you talk to?

A. A female gas attendant.

Q. Is she white or colored?

A. Colored.

Q. What was her name?

A. Vivian Steele.

Q. Did you have any transactions with her?

A. I did.

Q. What were they, sir?

A. Why, I drove in the premises with my car——

[fol. 205] Mr. Spieler: Excuse me. I make the same objection to any conversation between this witness and Steele not in the presence of the defendant.

The Court: Overruled.

Mr. Spieler: Exception" (S. M., p. 258).

2. "Mr. Hartfield: At this point I offer Government's Exhibit 3 in evidence.

Mr. Spieler: I object to it.

The Court: Overruled.

Mr. Spieler: Exception.

(Government's Exhibit 3 for identification received in evidence.)

The Court: That is the $5 bill the witness has referred to" (S. M., p. 260).

C. The government was permitted to introduce the following incompetent, irrelevant and immaterial testimony upon the examination of government witness, Thomas F. Burchill, Jr.

"Q. What was the practice in the Office of Price Administration with respect to releasing defendants if they promised to cooperate?

Mr. Spieler: I object to that as not binding on the defendant.

The Court: I will take it.

Mr. Spieler: Exception.

A. Whenever an operator of a gasoline——

[fol. 206] The Court: Make it brief. Go ahead.

The Witness: I will, your Honor.

A. (Continuing) Whenever an operator of a gasoline station was arrested or caught in illegal possession the policy was not to arrest him immediately, so that the office could go further up the line. We were not interested in locking up gasoline men unless they refused to cooperate with the Government. If they cooperated, then we would leave them out for a while and have them make arrangements with the supplier to come down and we would see if

we could arrest the supplier, who is the important person as far as we were concerned" (S. M., pp. 394-395).

D. The Court permitted the government to cross-examine the defendant, Jack Davis as to his refusal to answer questions at a conference held with the Assistant United States Attorney on the ground that the answers would tend to incriminate the defendant.

"Q. Do you remember being asked this: 'Did you promise Mr. Burchill that you would reveal the source of the A coupons that you had in your possession?' Do you remember making the answer: 'You told me not to answer any questions that I didn't want to.' You then remember my asking you this question: 'As I understand it, you refuse to answer on the ground that you might be incriminated?' And your answer was: 'Yes.'?

A. That was my answer.

Q. Why did you make the answer that the answer to that question might tend to incriminate you?

[fol. 207] A. Because you told me to say that in effect; you advised me that way.

Q. You answered all my questions up to that point, didn't you?

A. I do not recall that.

Q. I show you the statement (handing).

A. Yes, particular questions—you mean this whole thing?

Q. Start at the front, read it through and tell me if before you get to that, the last two or three questions that I asked you, you ever refused to answer any of the questions on the ground that you might be incriminated.

A. Do you want me to read this, Mr. Hartfield?

The Court: No. He just wants to know whether up to that point in the examination you had made any such statement that an answer might tend to incriminate you?

The Witness: Yes, I answered these questions up to that point, yes.

Q. Why when you got to that point at the end of the examination did you refuse to answer on the grounds that you might be incriminated?

A. I think you have an answer prior to that that is similar to the same answer.

Q. I asked you the question——

A. That I refused to answer.

Q. I ask you why you refused to answer at that point on the grounds that you might be incriminated?

A. Because you had so advised me in advance.

Q. Why did you pick out that question to make that answer to?

A. I didn't just single that out, Mr. Hartfield. There [fol. 208] were several others I refused to answer.

Q. You have just answered me that up to that point you had answered all the questions.

A. Yes.

Q. Why when I asked you the question, did you admit to Burchill where you got the coupons, did you suddenly change your mind and say, 'I refuse to answer on the grounds that I might be incriminated'?

A. I had never made such a statement to Mr. Burchill and I just didn't want to answer, that is all, on account——

Q. Why did you say that?

A. Because I took your advice" (S. M., pp. 471-473).

VIII

The Court improperly instructed the jury to the substantial prejudice of the defendant and the Court's instructions to the jury were insufficient, too general and not calculated to aid the jury in the application of the evidence to the specific charges contained in the information.

IX

The Court erred in refusing to give the following instructions requested by the defendant to which refusal the defendant duly and regularly excepted:

> A. The Government has introduced evidence that the defendant on various occasions authorized or knew about the sale of gasoline at prices in excess of the maximum prices authorized by law. The jury is instructed that the defendant is not charged with the crime of selling gasoline in excess of the prices au- [fol. 209] thorized by law. The jury is therefore instructed that they may not consider this evidence as proof of the guilt of the defendant for the crime charged in the information.
>
> B. Certain witnesses for the Government have testified as to certain admissions made by the defendant.

The jury is instructed that the defendant can not be found guilty upon proof only of these admissions. The Government must in addition to the admissions adduce evidence which will establish beyond a reasonable doubt the defendant's connection with the crime charged in the information. If therefore the jury should find that there is no evidence except the admissions connecting the defendant with the crime charged in the information, then they must return a verdict of not guilty.

Wherefore, said defendant prays that the judgment and sentence rendered by the United States District Court for the Southern District of New York be reversed and for such other and further relief as to the Court may seem just and proper in the premises.

Dated, New York, April 10th, 1945.

Irving Spieler, Attorney for Appellant, 475 Fifth Avenue, New York, N. Y.

[fol. 210] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1944

No. 362

(Argued June 8, 1945. Decided August 8, 1945)

UNITED STATES, Appellee,

v.

JACK DAVIS, Appellant

Before L. Hand, Augustus N. Hand and Frank, Circuit Judges

Appeal from a judgment of conviction of the District Court for the Southern District of New York upon one count of an information, charging a violation of § 633(2)(a)(5), of Title 50, War Appendix, in having in the accused's possession gasoline ration coupons, contrary to the provisions of Ration Order No. 5C and General Ration Order No. 8, issued by the Office of Price Administration.

Samuel Mezansky, for the appellant.
David Hartfield, Jr., for the appellee.

[fol. 211] L. HAND, C. J.:

Davis appeals from a judgment of conviction upon an information for having unlawfully in his possession "168 gasoline ration documents"—coupons—which represented 504 gallons of gasoline. The only substantial point raised upon the appeal is whether the search was lawful which ended in the seizure of several sheets or "blocks" of gasoline coupons, and of some "bingo" sheets, the last, as we understand it, being official forms on which used gasoline coupons have been pasted. The testimony upon which the validity of the search turns was heard by the judge, who at its conclusion declared that he believed the prosecution's witnesses. The upshot of their story was as follows. Davis maintained a "filling station" in the Borough of the Bronx, which the witnesses—two officers of the Office of Price Administration and a city detective—undertook to investigate. One of these drove a car to the pumps, and found a woman in attendance who filled his tank at his re-

quest without asking for coupons; after she had done so, she did ask him for them, and he answered that he had none. She replied that in that case she must ask a higher price for the gasoline, which he paid and then drove away. A second officer then drove another car to the pumps, and the same thing occurred. The officers then arrested the woman, who said that she had followed Davis's general orders in both instances. Davis himself appeared at the station shortly afterwards, and the officers arrested him also. He denied at the trial that he had been arrested, but, as we have said, the judge believed the officers, and we accept his finding. On the premises and near two of the usual gasoline pumps, was an office the entrance to which was by a door, locked at the time. To each of the pumps was attached a tin box holding gasoline coupons; a count of which showed that they did [fol. 212] not cover the amount by which the storage capacity was diminished by sales. The officers faced Davis with this discrepancy and he answered that he had coupons enough to make it up. They then asked leave to go into the office which at first he refused. Later, one of them with a flashlight tried to look inside the office from outside; and when Davis saw this, he said to the officers that if they meant to go so far as that, they had better take the key and enter. He then directed his partner, to whom he had given the key after his arrest, to turn it over to the officers. They entered and found the documents mentioned, which they seized and retained. The question is whether the search so made was unlawful. The judge found that Davis's consent was "voluntarily" given, and for that reason denied the motion to suppress the evidence. We need not decide that that finding is wrong, for we can dispose of the case upon other grounds; but we must own to some doubt whether a consent obtained under such circumstances should properly be regarded as "voluntary." Davis must have known, under arrest as he was, that the officers were not likely to stand very long upon ceremony, but in one way or another, would enter the office.

However, it appears to us that the search was "reasonable," regardless of Davis's consent. Section 633(2)(a)(2) of Title 50, War Appendix, provides that, if during a national emergency the President decides that there is a shortage of material necessary for defense, he may allocate existing material as he thinks necessary. The Administrator of the Office of Price Administration—in the exercise

of powers which the President delegated to him under this statute—promulgated General Ration Order, No. 8, effective April 15, 1943, § 2.6 of which forbids the possession of any "ration document" except by the person to whom it was issued, or by his agent, or unless the possessor gets it from another person "in accordance with a ration order." [fol. 213] Section 633(2)(a)(5) imposes a penalty for the violation of this regulation, and that is the crime charged here. The Administrator also promulgated Ration Order 5C, effective November 9, 1942, which indeed constitutes a kind of code for the rationing of gasoline. Section 1394.8104(a) of this provides that "all coupon books, coupons," shall "remain the property of the Office of Price Administration," which "may require the surrender and return" of them whenever it thinks that necessary in the public interest. Section 1394.8217(a) makes every dealer accountable for all coupons received by him, and enacts that the "aggregate gallonage value of * * * coupons and other evidences on hand and on deposit * * * shall at all times be equal to, but not in excess of the number of gallons of gasoline which would be required to fill the storage capacity * * * as shown by the current certificate of registration." That is to say, the documents received shall account for any shortage of gasoline in the tanks. Section 1394.8235(b) provides that "upon demand * * * every person shall produce for inspection" all his gasoline documents including coupons.

The argument of the prosecution is that since the coupons were the property of the Office and always open to its inspection, the officers were free to force an entrance into any building and seize whatever coupons they might find. For this they rely upon those decisions which hold that when a dealer continues to do business in general compliance with the regulations of the Office, he may be compelled by legal process to allow an inspection of all those papers which the regulations subject to inspection, and that he may not object that the inspection may disclose evidence relevant to a criminal prosecution against him. *Cudmore* v. *Bowles*, 145 Fed. (2) 697 (C. A. D. C.); *Bowles* v. *Rothman*, 145 Fed. (2) 831 (C. C. A. 2); *Bowles* v. *Beatrice Creamery Co.*, 146 Fed. (2) 774, 779 (C. C. A. 10); *Bowles* v. *Glick Bros. Lum-*[fol. 214] *ber Co.*, 146 Fed. (2) 566, 571 (C. C. A. 9); *Bowles* v. *Insel*, 148 Fed. (2) 91 (C. C. A. 5). In some of these decisions the dealer was a corporation, or at least the papers

called for were corporate papers, which do not enjoy any constitutional privilege against crimination (*Wilson* v. *United States*, 221 U. S. 361, 382, 383); and that was mentioned as one ground for the result. But there were others in which they were records of private business and the result was the same; moreover the rationale has always been that, when it has become necessary to regulate a business in the public interest, those who continue in it thereafter must be taken to have assented to the conditions imposed. The consequences of this theory are indeed far-reaching; it is becoming more and more usual to regulate businesses in cases of public emergency, a phrase which is confessedly exceedingly elastic. If any person already engaged in such a business must choose between abandoning his calling, or consenting to the surrender of his privilege against self-incrimination, when the regulations provide for inspection, the scope of the privilege is considerably circumscribed. Nevertheless, we do not wish to suggest any doubt that, so far as concerns inspection, the regulations are valid, or that Davis could not have been compelled by legal process to permit their inspection.

However, the officers did not demand their production by legal process; they took them without Davis's consent; and if the regulations subject any dealer in gasoline to a general search of his papers for the purpose of learning whether he has any subject to inspection and seizure, that is a far more serious invasion of his privileges than anything which has yet been decided. The point was considered in *Bowles* v. *Beatrice Creamery Co., supra*, 779 (146 Fed. (2) 774), and although it was not decided, the court was pretty obviously inclined against such searches, as in par-[fol. 215] ticular appears from its quotation from the reasoning of the Chief Justice in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 337, 364. We are very clear that to continue in a business after it has been regulated, as the dispensing of gasoline was regulated, does not expose a dealer to any general search; and that in so far as the prosecution in this case so asserts—as we understand it to do—it must fail. On the other hand there is of course no reason why such a dealer should be exempt from such searches as would in any event be "reasonable" in the ordinary constitutional sense; and we think that the search here before us was "reasonable," judged by that standard. The officers had just had personal ocular evidence that Davis was selling

gasoline without demanding coupons; and that he was using this forbearance as an excuse for exacting a higher price. That presupposed (unless he was merely winding up his business, which he did not suggest) that somewhere he must have a quantity of coupons, corresponding to those which he had not taken from his customers, for otherwise he would have been unable to replenish his tanks. When challenged with this shortage he said that he did have the necessary coupons, but would not say where they were. Later, after the officers discovered the sheets and blocks now in question he declared that they had been given him by customers who had delivered them to acquire a gasoline credit, so to say. However, the two sales, just made, completely contradicted this excuse; it was apparent that, whether or not at times customers did deliver coupons to him in advance of their purchases, it was possible, and part of his ordinary practice to sell to any casual stranger who did not have coupons, provided he would pay a higher price.

The search was in no sense exploratory; the officers did not enter to see what they might find, or at least so far as they may have done so they got nothing. They knew that [fol. 216] Davis must have contraband gasoline coupons in his possession; and although of course it was not certain that they were in the office, there was no other cache for them, which was anything like so probable. The coupons were not evidences of crime in the sense of being records of its commission: they were the direct "means of committing" it, and if the crime had been a felony, they could have been seized by search warrant wherever they were. § 612(2), Title 18, U. S. Code. True, the crime was only a misdemeanor (§ 633(2)(a)(5) of Title 50, War Appendix), and they could not have been seized even by warrant in premises removed from the place of arrest. But they were seized in premises closely adjacent; they were in a building which was a necessary part of the "filling station" where Davis was arrested; and if that building was within the undefined zone which may always be searched after the accused has been arrested, the search was lawful. In determining whether it was within that zone, it is vital to keep in mind the distinction which we have just made between records as such and the means of committing the crime, or its fruits; a wider search is more "reasonable" for the second than for the first. *United States* v. *Kirschenblatt*,

16 Fed. (2) 202 (C. C. A. 2). Indeed, for general support of this distinction it is scarcely necessary to do more than refer once more to the statute itself. § 612, Title 18, U. S. Code. It must be owned that the borders of this zone are most impalpable; and at least while the Eighteenth Amendment was in force, the ruling decisions were not entirely harmonious. *Marron* v. *United States*, 275 U. S. 192; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452. We recently had occasion to consider the question in *United States* v. *Lindenfeld*, 142 Fed. (2) 829, where after a consideration of all the authorities we concluded that, when a search incident to an arrest is for instruments or fruits of crime, it may extend [fol. 217] over "that part of the premises over which the offender's control and unlawful activities likely extended"; or, as we quoted from *Marron* v. *United States*, *supra*, 199 (275 U. S. 192), it may extend to objects within his "immediate possession and control." This test, at least the second expression of it, is certainly right, and in the case at bar the facts fitted it. Davis was on the spot; the key to the office was in the hands of his partner; the office itself was part of the premises which made up the filling station; the fact that the greater part of a filling station must be unenclosed is irrelevant to any interest involved. Had the coupons been in a room adjacent to another in which Davis was arrested, it would have been lawful, upon finding the key in his pocket to enter that room, and seize the coupons if one knew that they were there and did not enter only to explore. We can see no significance in the fact that the office was the only enclosed part of the station, or that Davis had given the key to his partner after his arrest.

The seizure of the coupons being lawful, nothing remains of the appeal. It is scarcely necessary to answer the argument that the evidence proving the sales to the two officers was irrelevant to the charge of unlawfully possessing the coupons. Rather, it was the effective answer to Davis's excuse that he had the necessary number of coupons in his possession. It is scarcely necessary to repeat that it is never an objection to the admission of evidence relevant to the proof of one crime that it is also evidence of another. The guilt was proved beyond the slightest peradventure, and it would be a defeat of justice to reverse the conviction.

Conviction affirmed.

[fol. 218] FRANK, Circuit Judge, concurring:

I add a few words only because I think it important to underscore our rejection of the following argument on which the Assistant United States Attorney chiefly relied: Whenever the government validly regulates any business and includes in its regulation a valid requirement that records be kept which shall be open to official inspection, then refusal to produce the records for such inspection authorizes the officers to enter the premises and seize the records. One variant of the argument was that refusal to permit inspection in such circumstances constitutes, in effect, the legal equivalent of consent to enter; another variant was that, in such circumstances, conduct of the defendant must be interpreted as consent to entry although, in other circumstances, the very same conduct would be regarded as refusal. In one way or another, the Assistant United States Attorney urged that obstruction of the right of the officers to inspect deprived the defendant of his usual privilege to be free of unreasonable search and seizure.

Even of those who regard with disfavor the constitutional privilege against self-incrimination,[1] there are few who do not agree that freedom from unreasonable search is one of the basic, indispensable, privileges of our democratic system of government. Were the Assistant United States Attorney's contention correct, then that privilege would vanish in large segments of American life. For it is fairly obvious that in the future many businesses will be subject to governmental inspection under constitutionally valid statutes. The complications of our modern industrial era make such inspection often socially desirable, despite its irksomeness. To augment such irksomeness by coupling it, as the Assistant United States Attorney would like, with the loss of a fundamental constitutional right would be to build up popular resistance to needed governmental action. Fortunately, his argument is wholly unsupported in authority or reason.

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[1] I do not happen to share that view.

[fol. 219] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of August one thousand nine hundred and forty-five.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

UNITED STATES, Plaintiff-Appellee,

v.

JACK DAVIS, Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 220] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States v. Jack Davis. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed August 8, 1945. Alexander M. Bell, Clerk.

[fol. 221] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 220, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States of America, Plaintiff-Appellee, against Jack Davis, Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of August, in the year of our Lord one thousand nine hundred and forty-five, and of the Independence of the said United States the one hundred and seventieth.

Alexander M. Bell, Clerk, by A. Daniel Fusaro, Deputy Clerk. (Seal.)

[fol. 222] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 13, 1945.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[Endorsed on Cover:] Enter Irving Spieler. File No. 50,107. U. S. Circuit Court of Appeals, Second Circuit, Term No. 404. Jack Davis, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 6, 1945. Term No. 404 O. T. 1945.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 404

JACK DAVIS,

Petitioner,

—vs.—

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

IRVING SPIELER,
Attorney for Petitioner.

IRVING SPIELER,
SAMUEL MEZANSKY,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1945

No.

JACK DAVIS,

Petitioner,

—vs.—

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Jack Davis, respectfully submits his petition to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on August 8th, 1945, affirming the conviction of your petitioner in the United States District Court for the Southern District of New York.

History of the Case

On August 4th, 1944, an information was filed against the petitioner in the United States District Court for the Southern District of New York, charging him in one count

with the unlawful possession and control of approximately 168 gasoline ration documents of the type denominated "A" in violation of Ration Order No. 5C and General Ration Order No. 8 issued by the Office of Price Administration.

Your petitioner was tried before District Judge, Alfred C. Coxe and a jury on the 10th and 11th days of January, 1945. The jury disagreed.

On February 26th, 1945, a new information, containing four counts was filed against your petitioner, charging violations of the same ration orders (R. 4-6). Petitioner was tried before District Judge Vincent L. Leibell and a jury between the 7th and 9th days of March, 1945. A motion made by your petitioner to suppress evidence obtained as claimed by your petitioner by an illegal search and seizure, was denied by Judge Leibell after a pretrial hearing. The entire minutes of the pretrial hearing are reprinted in the Record.

The jury rendered a verdict of guilty on the first count of the information, which is the same offense upon which the jury had previously disagreed and rendered a verdict of not guilty on the third count. The second and fourth counts were withdrawn upon motion by the Government before the commencement of the trial.

On the 23rd day of March, 1945, your petitioner was sentenced to imprisonment for a term of six months and fined the sum of $1,000 with the direction that your petitioner stand committed until the fine had been paid (R. 191).

Petitioner's conviction was affirmed by the Circuit Court of Appeals in and for the Second Circuit on August 8th, 1945. The opinion of the Circuit Court of Appeals was written by Honorable Learned Hand, Circuit Judge, and the concurring opinion was written by Honorable Jerome N. Frank, Circuit Judge (R. 210).

This petition is filed to obtain a review of the judgment of the Circuit Court of Appeals. The jurisdiction of this

Court is invoked under Section 240a, Judicial Code, 28 U. S. C. A. 347a.

Constitutional Provisions, Statutes and Regulations Involved

The following sections of the Constitution and regulations are involved:

Constitution of the United States, Amendment 4:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Ration Order No. 5C, Section 1394.8153:

> "Transfers to consumers in exchange for coupons, ration checks and gasoline purchase permits—(a) Cou-

pons in books issued for registered and commercial motor vehicles. Transfer may be made and accepted in exchange for coupons contained in Class A, B, C, D, T-1, or T-2 books, only under the following conditions:

* * * * *

(1) At the time of transfer, the transferor must require presentation of the coupon book and must detach therefrom coupons having an aggregate unit value equal to the amount of gasoline transferred: *Provided*, That if the transferee is able to accept only a portion of the amount of gasoline represented by the unit value of a coupon, the transferor shall nevertheless detach an entire coupon. No transfer may be made pursuant to this paragraph in exchange for a coupon detached prior to the presentation of the coupon book to the transferor."

Ration Order No. 5C, Section 1394.8217:

"Records to be kept by dealers and intermediate distributors. (a) Every dealer and intermediate distributor shall be accountable for all gasoline, ration credits, gasoline deposit certificates, coupons and other evidences received by him. Gasoline deposit certificates, coupons and other evidences received at or for a place of business shall be, at all times when the dealer or distributor is open to transact business, retained by him at the place of business for which they were received, or deposited in a ration bank account maintained for that place of business, until such time as they are surrendered to a dealer or distributor in exchange for gasoline, or otherwise surrendered pursuant to Ration Order No. 5C. The aggregate gallonage value of gasoline deposit certificates, coupons and other evidences on

hand or on deposit for each, place of business of a dealer or intermediate distributor, shall, at all times, be equal to, but not in excess of, the number of gallons of gasoline which would be required to fill the storage capacity of such place of business, as shown by the current certificate of registration, except for: * * *"

Ration Order No. 5C, Section 1394.8227:

"All tire inspection records and gasoline deposit certificates and all coupon books, coupons, and other evidences are, and when issued shall remain, the property of the Office of Price Administration. Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law enforcement officer of the United States or of any state, county, or local government, every person shall produce for inspection any tire inspection record and gasoline deposit certificate and any gasoline coupon books, coupons, and other evidences in his possession or control, whether valid, invalid, void or expired, and whether or not issued or acquired in accordance with Ration Order No. 5C. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States, or of any state, county or local government are authorized to make such inquiries of any person as may be pertinent to determine whether a violation of Ration Order No. 5C has been or is being committed, and are authorized to receive the surrender of all gasoline deposit certificates, gasoline coupon books, coupons and other evidences acquired by any person otherwise than in accordance with Ration Order No. 5C, whether valid, invalid, void or expired."

Ration Order No. 5C, Section 1394.8302:

"Suspension orders. Any person who violates the Ration Order No. 5C may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any gasoline, tire or passenger automobile. Proceedings for the issuance of suspension orders shall be instituted and governed pursuant to the provisions of Procedural Regulation No. 4."

Title 50 (App.) U. S. C. A., Section 633 (2)(a)(5):

"Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

Summary Statement of Matter Involved

The count upon which the petitioner was convicted charged that your petitioner unlawfully had in his possession and control approximately 168 gasoline ration documents of the type known as "A" in sheet form representing approximately 504 gallons of gasoline and that your petitioner was not the person or agent of the person to whom these ration coupons were issued or by whom they were acquired in accordance with Ration Order No. 5C and General Ration Order No. 8, issued by the Price Administrator.

Your petitioner's conviction was based entirely upon his possession of gasoline coupons introduced in evidence as

Government's Exhibits 4 and 5 (Stenographer's Minutes, 225-227).

The manner in which this evidence was obtained and the rulings of the lower courts in respect thereto, constitute the main ground urged by your petitioner for the granting of this petition for a Writ of Certiorari.

The petitioner is president of a corporation known as Davis Auto Laundry Corporation, which operates a gasoline station in the Borough of Bronx, City of New York. On June 20th, 1944, two detectives, both members of the New York City Police Department, Fitzpatrick and Colby, together with three agents attached to the Office of Price Administration, Sussman, Pearman and Tarter, drove to a place near the petitioner's gasoline station at about 11 o'clock in the morning. For two hours they observed the activities of the service station (R. 69).

These officers and agents had no search warrant and they had no warrant for the arrest of the petitioner.

Two of the agents separately then entered the gasoline station and beguiled an employee, a woman in attendance while your petitioner was not present, to make two separate sales of gasoline at charges in excess of ceiling prices and without demanding coupons (R. 69-70, 96). The employee who appeared as a witness for the government contradicted the testimony of the agents and testified that she first discovered that the agents had no coupons after she had sold the gasoline and requested the coupons (R. 96). She further testified that she was misled by the agents, both of whom pretended to be regular customers of your petitioner and that she would not have sold the gasoline if she had known that the agents had no coupons or if she had not been fooled by their pretended relationship to the petitioner (R. 112).

It is conceded that your petitioner was not present at the time these sales were made.

Your petitioner appeared at the station shortly thereafter. Your petitioner's automobile was searched (R. 93). The agents demanded and received the keys to the tin boxes attached to the gasoline pumps (R. 23). These boxes were opened and coupons counted by the agents (R. 23). One of the agents began examining and measuring the gasoline tanks and their contents (R. 23). Your petitioner was then taken by one of the detectives and one of the agents to a small building approximately 30 feet away from the gasoline pumps (R. 24). This consisted of a waiting room and private office of your petitioner. The door to the private office was locked (R. 24). Your petitioner had given the keys to his partner by the name of Payne (R. 74). For at least an hour, your petitioner was questioned in the waiting room adjoining your petitioner's private office by Detective Fitzpatrick and agent Sussman. They asked for leave to enter your petitioner's private office, which your petitioner refused. The following excerpts in the testimony of government's witnesses are examples of the threats and representations made by the detectives and agents to gain entrance to the petitioner's private office:

Detective Fitzpatrick testified as follows (R. 25):

> "I explained the law to Davis in that I told him that these were Federal agents, 'They have you now for one rap. The rap is the over-the-ceiling prices of gasoline. You are now under arrest, and any property in the office will be seized by them.' I said, 'The best thing to do is to open the door and save a lot of time.'
>
> He wanted to know what would happen to him. I said, 'Well, you have an OPA violation and you have an arrest now, and this is certainly going to be tough, and if you have any more stuff you might as well give it to him.'"

Again on cross examination, Fitzpatrick testified that he told petitioner when the petitioner refused to open the door to the private office "they have a perfect right to look the place over. They are Federal agents and any stuff that you have in regards to this ration currency is their property and you are only custodian of it during the time that it goes through your hands" (R. 41).

Upon the trial Detective Fitzpatrick testified that he warned the petitioner that "he was in the can" (Stenographer's Minutes 275)

Agent Sussman admitted upon cross examination as follows (R. 86):

> "Q. Did you try to convince Davis that he ought to open that door leading into the private office? A. I didn't try to convince him. I told him he would have to open that door."

Agent Sussman also testified that he warned the petitioner that they had a right to go into the private office (R. 87). Apparently, while this was going on, another detective was shining a flashlight through a window into the private office of the petitioner (R. 48). Detective Fitzpatrick himself testified that from where he was sitting it looked as though Detective Colby was trying to force the window in the private office and enter (R. 48).

When the petitioner observed this, according to Government witness, Fitzpatrick, he remarked, "He don't need to do that. I will open the damn door" (R. 48).

Apparently agent Sussman had obtained the keys after the other agent had followed Payne and turned the keys over to petitioner, who allegedly opened the door to the private office (R. 48). According to agent Sussman, the petitioner opened his private safe, took out some manila envelopes

containing coupons and turned them over to him (R. 75). These are the coupons which were offered in evidence against the petitioner upon the trial as Exhibits 4 and 5.

The summary of the testimony appearing in the opinion of the Circuit Court of Appeals is quite adequate except that the issue as to the alleged arrest of the petitioner is not fairly covered (Opinion, R. 210).

The Circuit Court of Appeals in its opinion, writes that the officers arrested the petitioner. The Court points out, however, that the petitioner denied at the trial that he had been arrested but the Court accepted the findings of the trial court that the testimony of the officers was correct.

The facts and circumstances surrounding the alleged arrest of the petitioner deserve special mention. Government witness Sussman testified that after your petitioner returned to the gasoline station after the sales had been made by the female attendant, he told the petitioner that he was under arrest (R. 84). This witness admitted that he did not tell the petitioner the charge upon which he was arrested (R. 84). This same witness admitted that he had no warrant for the arrest of the petitioner (R. 90).

The first time that agent, Sussman ever told the petitioner the charge for which he was allegedly arrested was after he had surreptitiously gained entrance to the petitioner's private office and seized the ration coupons which were offered in evidence against the petitioner upon the trial. At that time, according to this witness, he told the petitioner that he was charged with selling gasoline at above ceiling prices and having unlawful possession of "A" coupons (R. 93). It is therefore apparent that the alleged arrest is based on evidence obtained as a result of the search and seizure.

Certain other facts and circumstances connected with the alleged arrest of the petitioner are not in dispute. There

is no denial that after the alleged arrest of the petitioner, he was not taken to any police precinct or to a United States Commissioner or to any other Committing Officer. Instead petitioner was taken to the Office of Price Administration on the same day where he was questioned for many hours by Mr. Burchill (R. 60, 61) and on the same day the petitioner was released from the custody of the alleged arresting officers and told by this Mr. Burchill to go home (R. 66).

The petitioner was not actually lawfully arrested or arraigned before a Commissioner until about a month later (R. 66).

At the close of the pretrial hearing, the motion to suppress the evidence obtained in the above matter was denied by the Trial Judge (R. 157). The Trial Court held as the Circuit Court of Appeals points out in its opinion, that the search and seizure was consented to by the petitioner (R. 157). The Circuit Court of Appeals in its opinion admits to a doubt as to the correctness of the finding of the Trial Judge and confesses that the circumstances do not warrant the conclusion that the petitioner voluntarily consented to the search and seizure (Opinion, R. 212). The Circuit Court of Appeals also rejected quite vehemently the contention of the Assistant United States Attorney that a general search of the premises of the petitioner was authorized because the coupons were the property of the Office of Price Administration and required by the regulation to be kept open for inspection. Circuit Judge Frank wrote a concurring opinion only for the purpose of underscoring as he stated the rejection of this contention by the Assistant United States Attorney.

Although the Circuit Court of Appeals disapproved of the finding of the Trial Judge and rejected the contention of the Assistant United States Attorney, the Court nevertheless sustained the vicious and very general search and

seizure on the ground that the search was a reasonable search as an incident to a lawful arrest.

Other material facts bearing upon the questions raised by this petition and urged in the court below, will be alluded to from time to time in the course of the petition and the brief accompanying it. Aside from the question of the admissibility of the evidence obtained as a result of the search and seizure, there was a serious doubt as to the guilt of the petitioner. In fact, a previous jury had disagreed as to the guilt of the petitioner upon the same charge. The petitioner took the stand in his own behalf and explained in detail the circumstances surrounding his possession of the coupons represented by Government's Exhibits 4 and 5 (Stenographer's Minutes 430). Petitioner testified that his regular customers left with him their gasoline coupons (Stenographer's Minutes 425). Petitioner in turn gave to each of his customers a receipt specifying the number and type of coupons left with him (Stenographer's Minutes 425-426). These receipts were surrendered upon the delivery of gasoline (Stenographer's Minutes 426-427). The petitioner was corroborated by four of his regular customers including an employee of the Department of Parks of the City of New York and a practicing physician (Stenographer's Minutes 490-497).

Question Presented

1. Were Government's Exhibits 4 and 5 taken from the petitioner as a result of an illegal search and seizure within the prohibitions of the Fourth and Fifth Amendments to the Constitution of the United States?

Reasons for Granting the Petition

The introduction of the evidence of the search and seizure plainly transgressed the constitutional rights of the petitioner. The Fourth Amendment to the Constitution provides no exception in its guarantee of protection. Although the Circuit Court of Appeals in its opinion in this case recognizes that freedom from unreasonable search is one of the basic indispensable privileges of our democratic system of government (Opinion, R. 218), yet the distinctions and qualifications made in the lower Court's decision seriously impair the effectiveness of the protection offered by the Fourth Amendment. It is respectfully submitted that the Court below erred in its determination of the question stated above and applied a rule which is in conflict with the weight of authority and the applicable decisions of this Court.

As will be more fully urged in the brief accompanying this petition, the Court below by this decision and its previous decision in *United States* v. *Lindenfeld*, 142 F. (2d) 829, has created an illusory and indefinable exception to the protection guaranteed by the Fourth Amendment. The Court below itself excuses its apparent departure from the traditional principles and standards governing the application of the provisions of the Fourth Amendment by the statement in its opinion that the ruling decisions of this Court are not entirely harmonious. The lower Court, in its opinion, writes as follows (Opinion, R. 216).

> "It must be owned that the borders of this zone are most impalpable; and at least while the Eighteenth Amendment was in force, the ruling decisions were not entirely harmonious. *Marron* v. *United States*, 275 U. S. 192; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452."

This is not the first time that the lower Court has expressed a doubt as to the proper standard or test to be applied in the determination of the question involved in this case.

In *United States* v. *Poller*, 43 F. (2d) 911, 913, the lower Court admitted that the question to what extent the premises under the direct control of a man arrested may be searched was a troublesome one.

In *United States* v. *Kirschenblatt*, 16 F. (2d) 202, the lower Court limited the extent of the search permissible. However, in a subsequent case, *United States* v. *Gowen*, 40 F. (2d) 593, 598, the Court overruled its own decision in *United States* v. *Kirschenblatt* and justified its action on the decision of this Court in *Marron* v. *United States*, 275 U. S. 192. However, the decision of the lower Court in *United States* v. *Gowen*, 40 F. (2d) 593 was reversed by this Court in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344. As appears more fully in the accompanying brief, the lower Court still justifies its extension of its own created exception to the generally accepted principles of law, upon the decision of this Court in *Marron* v. *United States*, 275 U. S. 192, although this Court in subsequent decisions has definitely expressed and limited the doctrine applied in *Marron* v. *United States*, 275 U. S. 192.

The lower Court admits that there is confusion between cases in other circuits (43 F. 2d 911, 913) and also admits in its decision in this case that the zone within which a person allegedly arrested for a crime may be searched is undefined (Opinion, R. 216).

Your petitioner respectfully submits that the guarantee of protection against oppressive tactics contained in the Fourth Amendment loses strength and vitality as a result of the restrictive and inadequate distinctions and legal interpretations made in the decision of the lower Court.

It is of paramount importance that the rule or test to be applied to afford the greatest protection should be a rule or test which can be easily applied and understood and which is uniform. If the legal interpretations appearing in the decision of the lower Court are permitted to stand, then searches and seizure by arresting officers would be without any clearly defined or reasonable limitations. A decision justifying so far reaching a search plainly calls, we believe, for a review by this Court.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify the case to this Court for review and determination as provided by the statutes of the United States, and that your petitioner may have such other and further relief in the premises as this Court may deem proper.

JACK DAVIS,
Petitioner.

By IRVING SPIELER,
Attorney.

Dated, New York, N. Y., September 4th, 1945.

Supreme Court of the United States

OCTOBER TERM, 1945

No.

JACK DAVIS,

Petitioner,

—vs.—

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

I

Opinions Below

There was no opinion of the District Court.

The opinion of the Circuit Court of Appeals (R. 210) has not yet been reported.

II

Jurisdiction

1. The order for mandate of the Circuit Court of Appeals under review was entered on August 8th, 1945 (R. 219).

2. The jurisdiction of this Court is invoked under Section 347, Subdivision (a), Title 28, United States Code Annotated (Judicial Code, Section 240, Subdivision (a), as amended by the Act of February 13th, 1925).

III

Facts

A statement of all that is material to the consideration of this petition has been set out in the petition and under the appropriate points in the brief. For the sake of brevity, they shall not be repeated here.

ARGUMENT

POINT I

Government's Exhibits 4 and 5 should have been excluded as evidence on the ground that they were obtained as a result of an illegal search and seizure within the prohibition of the Fourth Amendment.

This error was covered by Assignment of Errors III, IV and V (R. 196). The Circuit Court of Appeals has devoted the major portion of its opinion to the consideration of this question (Opinion, R. 210).

The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy.

United States v. *Lefkowitz*, 285 U. S. 452;
Byars v. *United States*, 273 U. S. 28.

The law is well settled that general exploratory search of premises at the time of an alleged arrest is unreasonable and prohibited by the Fourth Amendment.

United States v. *Lefkowitz*, 285 U. S. 452;
Go-Bart Importing Co. v. *United States*, 282 U. S. 344;
Agnello v. *United States*, 269 U. S. 20.

Under the applicable decisions of this Court, it is clear that the introduction of the evidence of the search and seizure plainly transgressed the constitutional rights of the petitioner. The evidence sought to be suppressed was found by the agents and detectives in the safe of the locked private office of the petitioner, removed from the immediate place of the petitioner's arrest. The agents and detectives had gained entrance to this office by force and threats and the Circuit Court of Appeals finds that petitioner's submission to the threats of the detectives and agents did not amount to a consent to the search (Opinion, R. 212).

As the Circuit Court of Appeals wrote in its opinion:

> "Davis must have known, under arrest as he was, that the officers were not likely to stand very long upon ceremony, but in one way or another, would enter the office."

The lower Court also rejected strongly the contention of the Assistant United States Attorney that since the gasoline coupons were the property of the Office of Price Administration, the officers were free to force an entrance into any building and seize whatever coupons they might find (Opinion, R. 215).

The question presented by this petition is whether the search and seizure justified by the lower Court to have been made as lawfully incident to the arrest of the petitioner transgressed the petitioner's rights under the Fourth and Fifth Amendments.

This Court clearly answers this question by its decision in *United States* v. *Lefkowitz*, 285 U. S. 452.

In the *Lefkowitz* case, respondents were arrested in the execution of a warrant. After the arrest of the respondents, the officers not only searched their person, but opened and examined and took the contents of desks of two rooms divided by a partition. The searches and seizures were made without a search warrant. This Court held that the arrest of the respondents did not justify a general exploratory search of the premises and therefore the search and seizure was unreasonable.

The facts of the case at bar are stronger. In this case, there was no warrant for the arrest of the petitioner. The agents and detectives had no search warrant. The incriminating evidence was not found on petitioner's person or in his immediate possession or control. The gasoline coupons were in a safe in a locked private office removed from the immediate place of arrest of the petitioner. As the lower Court finds, the agents and detectives gained access to this room by force and threats (R. 212).

It is respectfully submitted that the decision of this Court in *United States* v. *Lefkowitz, supra,* is controlling, and the search and seizure was clearly unreasonable and the lower courts erred in denying the motion to suppress the evidence obtained as a result of the search and seizure.

The lower Court in its opinion justifies the search and seizure upon nice distinctions which are not only untenable as a matter of fact, but contrary to the applicable decisions of this Court. The reasoning of the lower Court is not only doubtful logic, but is calculated to destroy the protection guaranteed by the Fourth Amendment.

Stated categorically, the argument of the lower Court amounts to this:

1. The officers had ocular evidence that petitioner was selling gasoline without coupons.

2. Therefore, the officers knew that somewhere petitioner must have a quantity of coupons corresponding to those which petitioner had not taken from his customers.

3. Such coupons were the direct "means of committing" the crime.

4. Therefore, under the decision of this Court in *Marron v. United States,* 275 U. S. 192, the officers could search any part of the premises under the petitioner's control for these coupons.

If we thus dissect the arguments of the lower Court, the error in the logic becomes crystal clear.

It is true that the agents, as the lower Court finds, had induced a female attendant to sell gasoline without coupons and for prices over the ceiling. It is also true that there is some testimony that the female attendant had stated that in making the sales in that manner she followed the orders of the petitioner. At that point, the alleged offense of selling gasoline without coupons and at over the ceiling prices had been completed. The officers and agents had all the proof that they needed. They were in possession of the marked bills which they had given as a purchase price (R. 69-70, 96).

Petitioner was never arrested for that offense. He was never charged with that offense.

Certainly, the alleged commission of this crime in the presence of the officers did not justify an exploratory search of the safe in the petitioner's private office for gasoline coupons which the lower court held the officers must have known that the petitioner had in his possession.

The lower Court argues that because the petitioner sold gasoline without coupons, that somewhere he must have a quantity of coupons corresponding to those which he had not taken from his customers, for otherwise petitioner would

have been unable to replenish his tanks (Opinion, R. 215).

This reasoning is fundamentally fallacious. It does not necessarily follow that because the owner of a gasoline station makes two sales without coupons that he must have contraband gasoline coupons in his possession. It might mean merely that the gasoline owner could not get as much gasoline as he needed from his supplier for he would have less coupons to surrender. There are dozens of other possibilities. Certainly, the protection guaranteed by the Fourth Amendment to the Constitution should not depend upon the mystic powers of the arresting officers. The lower Court credits the officers with possession of particularly acute minds. Have we a right to speculate and say that the officers must have known that somewhere and in some place the petitioner had contraband gasoline coupons? It is admitted that these coupons were not plainly visible. They were not at or near the gasoline pumps. They were not on top of any desk. They were in the safe of a locked private office removed from the petitioner's place of arrest.

No matter how strong a belief the officers had that there must be contraband gasoline coupons at some place, this was no justification for the very general and vicious search made in this case.

In *Agnello* v. *United States*, *supra*, 269 U. S. 20, 33, this Court wrote as follows:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

The lower Court further justifies the wide search on the ground that the contraband coupons were the direct "means

of committing" the crime. It is difficult to perceive how the alleged possession of contraband gasoline coupons would be the direct means of committing an offense allegedly committed in the presence of officers of selling gasoline without coupons. The distinction made by the lower Court is so fine that clearly any record would come within the test applied by the lower Court. There would therefore be no limitations on searches and seizures and the Fourth Amendment would lose vitality and meaning. Moreover, the argument of the lower Court is circuitous. How did the officers know that the contraband gasoline coupons were the direct means of committing the offense until after they found them? It appears that the lower court attempts to justify the search by what was found which is contrary to the well established principles of law. An arrest may not be used as a pretext to search for evidence.

United States v. *Lefkowitz*, 285 U. S. 452, 467.

The lower Court further seeks to justify the search of petitioner's private office on the decision of this Court in *Marron* v. *United States*, 275 U. S. 192. The *Marron* case must be strictly limited to its own facts. Moreover, the decision in the *Marron* case has been modified and explained by subsequent decisions of this Court.

In *Go-Bart Importing Co.* v. *United States, supra*, 282 U. S. 344, this Court, at page 358 explains its decision in the *Marron* case as follows:

> "Plainly the case before us is essentially different from Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an inci-

dent to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. *These things were visible* and accessible and in the offender's immediate custody. *There was no threat of force* or general search or rummaging of the place." (Italics ours.)

In *United States* v. *Lefkowitz, supra*, 285 U. S. 452, this Court further explained its decision in the *Marron* case, as follows:

"These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the Marron Case. There, prohibition officers lawfully on the premises searching for liquor described in a search warrant, arrested the bartender for crime openly being committed in their presence. He was maintaining a nuisance in violation of the act. The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises, and other transactions including the keeping of accounts. *The ledger and bills being in plain view* were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense. The bills were deemed so closely related to the business that it was not unreasonable to consider them as employed to carry it on. While no use was being made of the book or papers at the moment of the arrest, they—like containers, chairs and tables for customers, the cash register, glasses and supplies—were kept to be utilized when needed. The facts disclosed in the opinion were held to justify the inference that when the arrest was made

the ledger and bill were in use to carry on the criminal enterprise." (Italics ours.)

In the *Marron* case the petitioner was charged with the offense of maintaining a nuisance. The entire premises and all its contents were part and parcel of the nuisance. Because of the very nature of the crime, everything in the premises became an instrument of the crime. This Court held that the officers could search and seize the things plainly visible by which the nuisance was being maintained.

Clearly, therefore, the *Marron* case is no authority for the search and seizure involved in this case. The gasoline coupons were not plainly visible. They had no connection with the actual crime for which the petitioner was allegedly arrested. They were not in the petitioner's immediate possession and control.

With due respect to the learned lower Court, this is not the first time that the lower Court has misconstrued or misapplied the doctrine of the *Marron* case.

In *United States* v. *Kirschenblatt*, 16 F. (2d) 202, the lower Court limited the extent of the search permissible. However, in a subsequent case, *United States* v. *Gowen*, 40 F. (2d) 593, 598, the Court overruled its own decision in *United States* v. *Kirschenblatt* and justified its action on the decision of this Court in *Marron* v. *United States*, 275 U. S. 192. However, the decision of the lower Court in *United States* v. *Gowen*, 40 F. (2d) 593 was reversed by this Court in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344. One more point deserves particular mention.

The entire argument of the lower Court is based upon the assumption that there was a legal arrest of the petitioner. It is conceded that the petitioner was not taken on the day of his alleged arrest to any police precinct or to the United States Commissioner. Instead he was taken

to the Office of Price Administration where he was questioned by a Mr. Burchill (R. 60, 61). The petitioner was released from custody on that day and told to go home (R. 66). The petitioner was not actually lawfully arrested or arraigned before a Commissioner until about a month later (R. 66). It is clear therefore, that in the first place there was no lawful arrest of the petitioner to justify any search. The requirements for a lawful arrest are clearly stated in the recent decision of this Court in *McNabb* v. *United States*, 318 U. S. 332, 342, 63 S. Ct. R. 608, 613:

> "Congress has explicitly commanded that 'It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial * * *'. 18 U. S. C. §595, 18 U. S. C. A. §595, 48 Stat. 1008, 5 U. S. C. §300a, 5 U. S. C. A. §300a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that 'the person arrested shall be immediately taken before a committing officer.' Compare also the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, 18 U. S. C. §593, 18 U. S. C. A. §593, which provides that when arrests are made of persons in the act of operating an illicit distillery, the arrested persons shall be taken forthwith before some judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest."

The Government is estopped both as a matter of law and as a matter of justice of attempting to justify the search and seizure on the ground of a lawful arrest.

The Government's contention is very clearly answered by the following portion of the opinion of the New York Court of Appeals in *People* v. *Marendi*, 213 N. Y. 600, 608:

> "'Arrest is the taking of a person into custody that he may be held to answer for a crime.' (Code of Criminal Procedure, section 167). The defendant was not taken into custody by Officer Murtha 'that he might be held to answer for a crime,' but only that he might be searched."

In the *Marendi* case, the Court of Appeals also wrote that a person arrested must be informed of the cause of the arrest. A police officer "can not arrest a man for one cause, and, when that is exploded, justify for another. Such a doctrine would be an incentive to the loosest practices on the part of public officers and a dangerous extension of their sufficiently great powers. They cannot be too firmly told that there is no such lawful thing as an arrest without an apparent or disclosed cause, to be justified thereafter by whatever may turn up." (213 N. Y. 600, 610.)

It is respectfully submitted that the decision of the lower Court destroys and renders innocuous the protection guaranteed by the Fourth Amendment. The decision is contrary to the applicable decisions of this Court. The decision of the lower Court plainly calls, we respectfully submit, for a review by this Court.

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved, and accordingly a writ of certiorari should be granted and the Court should review and reverse the decision of the Circuit Court of Appeals for the Second Circuit.

IRVING SPIELER,
Attorney for Petitioner.

IRVING SPIELER,
SAMUEL MEZANSKY,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 404

JACK DAVIS,

Petitioner,

—vs.—

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 404

JACK DAVIS,

Petitioner,

—VS.—

THE UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

No opinion was rendered by the District Court. The opinions by the Circuit Court of Appeals are reported in 151 F. (2nd) 140.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 8, 1945 (R. 166). The Petition for a Writ of Certiorari was filed September 6, 1945 and was granted November 13, 1945 (R. 168). Jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. Sec. 347 A), and as modified pursuant to the Act of March 8, 1934 (18 U. S. C., Sec. 688), by Rule XI of the Rules of Practice and Procedure After Verdict in Criminal Cases (292 U. S. 661, 666).

Questions Presented

Questions presented by this case are:

1. Is it a violation of the 4th Amendment for officers, after pretending to make an arrest for a misdemeanor committed in their presence but not in the presence of the petitioner, to enter by duress and search petitioner's private office removed from the place of arrest?

2. What are the limitations of a search of premises upon the arrest of a person for a misdemeanor committed in the presence of officers, and did the search in this case exceed the boundaries prescribed in the decisions of this Court?

3. Was the arrest of the petitioner valid, therefore justifying the search and seizure of the gasoline ration coupons as an incident thereof?

4. Did the search for and seizure of the gasoline ration coupons, claimed by the Government to have been made as lawfully incident to the arrest of the petitioner, transgress petitioner's rights under the 4th and 5th Amendments?

Constitutional Provisions, Statutes and Regulations Involved

Constitution of the United States, Amendment 4:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

"(2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

* * * * *

Ration Order 5 C issued by the Office of Price Administration (7 F. R. 9135 ff. as amended) provides in pertinent part as follows:

"Section 1394.8153. (a) *Coupons issued for registered and commercial motor vehicles.* Transfers may be made and accepted under the following conditions in exchange for Class A, B, C, D, or T coupons having an aggregate unit value equal to the amount of gasoline transferred. However, if the transferee is able to accept only a portion of the amount of gasoline represented by the unit value of the coupon, the transferor

shall nevertheless require the surrender of an entire coupon.

* * * * *

"Section 1394.8217. (a) Every dealer and intermediate distributor shall be accountable for all gasoline ration credits, gasoline deposit certificates, coupons and other evidences received by him. Gasoline deposit certificates, coupons and other evidences received at or for a place of business shall be, at all times when the dealer or distributor is open to transact business, retained by him at the place of business for which they were received, or deposited in a ration bank account maintained for that place of business, until such time as they are surrendered to a dealer or distributor in exchange for gasoline, or otherwise surrendered pursuant to Ration Order No. 5C. The aggregate gallonage value of gasoline deposit certificates, coupons and other evidences on hand or on deposit for each place of business of a dealer or intermediate distributor, shall, at all times, be equal to, but not in excess of, the number of gallons of gasoline which would be required to fill the storage capacity of such place of business, as shown by the current certificate of registration, * * *

"Section 1394.8235 (b) All tire inspection records and gasoline deposit certificates and all coupon books, coupons, and other evidences are, and when issued shall remain, the property of the Office of Price Administration. Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law enforcement officer of the United States or of any state, county, or local government,

every person shall produce for inspection any tire inspection record and gasoline deposit certificate and any gasoline coupon books, coupons, and other evidences in his possession or control, whether valid, invalid, void or expired, and whether or not issued or acquired in accordance with Ration Order 5C. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States, or of any state, county or local government are authorized to make such inquiries of any person as may be pertinent to determine whether a violation of Ration Order No. 5C has been or is being committed, and are authorized to receive the surrender of all gasoline deposit certificates, gasoline coupon books, coupons and other evidences acquired by any person otherwise than in accordance with Ration Order 5C, whether valid, invalid, void or expired."

Statement

The petitioner was charged in an Information containing four counts with the unlawful possession and control of gasoline ration documents consisting of "A" coupons in sheet form and the unlawful transfer of gasoline ration coupons (R. 3-5). He was convicted in the District Court for the Southern District of New York on one of the counts of the Information, which charged the unlawful possession of 168 gasoline ration documents consisting of "A" coupons in sheet form (R. 2). The jury acquitted the petitioner of the second count of the Information. The two remaining counts were withdrawn on motion by the Government before the commencement of the trial. The count upon which the petitioner was convicted was the same charge upon which a jury had previously disagreed after a trial on a

prior Information, which had been filed in the same court.

Petitioner was sentenced to imprisonment for six months and to pay a fine of $1,000 (R. 2). On appeal, the judgment was affirmed by the Circuit Court of Appeals in and for the Second Circuit (R. 166). The Opinion of the Circuit Court of Appeals was written by the Honorable Learned Hand, Circuit Judge, and a concurring Opinion was written by the Honorable Jerome N. Frank, Circuit Judge (R. 159-165).

The questions raised concern the validity of the search by which the ration coupons, which were introduced in evidence, were obtained. The facts in respect of that issue were developed at a pre-trial hearing before the Court without a jury on a Motion to Suppress (R. 8-9). The petitioner's conviction was based entirely upon his possession of gasoline coupons which were introduced in evidence and resulted from the search and seizure complained of (R. 9, 26). The testimony in respect to this search and seizure may be summarized as follows:

Petitioner is president of a corporation known as Davis Auto Laundry Corporation, which maintained a gasoline station in the Borough of Bronx, City of New York.

On June 20, 1944, two detectives of the New York City Police, Fitzpatrick and Colby, together with three agents attached to the Office of Price Administration, Sussman, Pearman and Tarter, drove near the gasoline station operated by the petitioner (R. 14). They observed the activities of the service station for approximately two hours (R. 59). These officers and agents had no search warrant and they had no warrant for the arrest of the petitioner.

Two of the agents then separately entered the gasoline station and beguiled a female employee, while the petitioner was not present, to make two separate sales of gasoline

at prices in excess of prices authorized by the regulations issued by the Administrator of the Office of Price Administration and without demanding coupons (R. 52-53, 73-75). This female employee, who appeared as a witness for the Government, contradicted the testimony of the agents, and testified that she first discovered that the agents had no coupons after she had sold the gasoline and requested the coupons (R. 74). She further testified that she was misled by the agents, both of whom pretended to be regular customers of the petitioner. She testified further at the pretrial hearing that she would not have sold the gasoline if she had known that the agents had no coupons, or if she had not been fooled by their pretended relationship to the petitioner (R. 88).

The petitioner was not present at the time these sales were made. A short time after these sales, the five officers returned to the premises and questioned the female attendant (R. 15, 24, 55).

While the officers were questioning the female attendant, petitioner arrived at the gasoline station (R. 16-17). The petitioner's automobile, which he drove to the gasoline station, was immediately searched (R. 72).

The officers demanded from the petitioner and received the keys to the tin boxes attached to the gasoline pumps (R. 17). These boxes were opened by the officers and the coupons counted (R. 17). One of the officers began examining and measuring the gasoline tanks and their contents (R. 17).

The petitioner was then taken by two of the officers to a building which consisted of a waiting room and the private office of the petitioner (R. 18). The door to the private office was *locked* (R. 18). Petitioner had given the key to his private office to his partner, named Payne (R. 56).

For at least an hour petitioner was questioned in the waiting room adjoining petitioner's private office by two of the officers. They demanded that he open the door to his private office, which he refused to do. To compel petitioner to open the door to his private office, the following threats were made:

Detective Fitzpatrick testified as follows (R. 19):

> "I explained the law to Davis in that I told him that these were Federal agents, 'They have you now for one rap. The rap is the over-the-ceiling prices of gasoline. You are now under arrest, and any property in the office will be seized by them.' I said, 'The best thing to do is open the door and save a lot of time.'
>
> "He wanted to know what would happen to him. I said, 'Well, you have an OPA violation and you have an arrest now, and this is certainly going to be tough, and if you have any more stuff you might as well give it to him.'"

On cross examination, Fitzpatrick testified that he told petitioner when the petitioner refused to open the door to the private office "they have a perfect right to look the place over. They are Federal agents and any stuff that you have in regards to this ration currency is their property and you are only custodian of it during the time that it goes through your hands" (R. 31-32).*

Agent Sussman admitted upon cross examination as follows (R. 66):

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* Upon the trial Detective Fitzpatrick testified that he warned the petitioner that "he was in the can" (Stenographer's Minutes 275).

"Q. Did you try to convince Davis that he ought to open that door leading into the private office? A. I didn't try to convince him. I told him he would have to open that door."

Agent Sussman also testified that he warned the petitioner that they had a right to go into the private office (R. 61-67). Apparently, while this was going on, another detective was shining a flashlight through a window into the private office of the petitioner (R. 37). Detective Fitzpatrick himself testified that from where he was sitting it looked as though Detective Colby was trying to force the window in the private office and enter (R. 37).

When the petitioner observed this, according to Government witness, Fitzpatrick, he remarked, "He don't need to do that. I will open the damned door" (R. 37).

Apparently agent Sussman had obtained the keys after the other agent had followed Payne and turned the keys over to petitioner, who allegedly opened the door to the private office (R. 37). According to agent Sussman, the petitioner opened his private safe, took out some manila envelopes containing coupons and turned them over to him (R. 57). These are the coupons which were offered in evidence against the petitioner upon the trial as Exhibits 4 and 5 and upon which petitioner's conviction was wholly based (R. 9, 26, 42).

Some mention should be made of the testimony in relation to the alleged arrest of the petitioner because the Circuit Court of Appeals, in its Opinion below, accepted the finding of the Trial Court that petitioner had been arrested (R. 160).

Officer Sussman testified that after petitioner returned to the gasoline station, after the sales had been made by the female attendant, he told the petitioner that he was

under arrest (R. 65). The officer admitted, upon the hearing, that he did not tell the petitioner the charge for which he was arrested (R. 65), and admitted that he had no warrant for the arrest of the petitioner (R. 69).

It is significant that the first time Officer Sussman told the petitioner the nature of the charge for which he was allegedly arrested was after the officers had surreptitiously gained entrance to petitioner's private office and had seized the ration coupons, which were offered in evidence against the petitioner upon the trial. At that time, according to the officer, he told the petitioner that he was arrested for selling gasoline at above ceiling prices and having unlawful possession of "A" coupons (R. 71-72). It is important to mention at this time that petitioner was never charged with the offense of selling gasoline at above ceiling prices without coupons, and it is apparent that the alleged arrest of the petitioner was based upon evidence obtained as a result of the search and seizure, and not upon anything that occurred prior thereto.

Even were we to accept the officers' statement that he told the petitioner that he was under arrest, certain other material facts are not disputed. There is no denial that after the alleged arrest of the petitioner he was not taken to any police precinct or to a United States Commissioner or to any other committing officer. Instead, petitioner was taken to the Office of Price Administration on the same day, where he was questioned for many hours by Mr. Burchill, an Enforcement Attorney (R. 46, 47). Petitioner was allowed to go home, and was released from the custody of the alleged arresting officers that same day (R. 50).

Petitioner was not actually lawfully arrested under any warrant or arraigned before a Commissioner until about a month later (R. 50).

At the close of the pre-trial hearing, the trial judge denied the Motion to Suppress on the ground that there had been voluntary consent to the search (R. 124). At the pre-trial hearing the Government did not strenuously urge that the consent to the search was voluntary, but in fact sought to justify the search and seizure on the ground that since the coupons were the property of the Office of Price Administration, the officers were free to force an entrance into any building and seize whatever coupons they might find (R. 161). Indeed, the Government argued that the officers could enter the premises with guns and ammunition and force "everybody to lay down and search the place without a warrant" (R. 10).

The Circuit Court of Appeals expressed some doubt as to the voluntariness of petitioner's consent (R. 160), and rejected quite strongly the contention of the Government that the regulations of the Office of Price Administration exposed a dealer in gasoline to a general search of his premises (R. 162). The Circuit Court of Appeals held that nevertheless the search was "'reasonable' in the ordinary constitutional sense" (R. 162).

Specification of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In affirming the order of the trial court denying the motion for the return of the gasoline coupons seized as the result of an unreasonable search and the suppression of the same as evidence.

2. In sustaining the legality of the search and seizure made herein.

3. In holding that the arrest of the petitioner justified the search of the premises adjacent as an incident thereof.

4. In sustaining the exploratory search of petitioner's office without the authority of a search warrant and as an incident of the alleged arrest of the petitioner.

5. In holding that the petitioner was lawfully arrested, therefore justifying search for gasoline ration coupons as the instruments or fruits of the crime.

6. In holding that the gasoline ration coupons found in the petitioner's private office were the direct "means of committing" the offense for which the petitioner was allegedly arrested.

ARGUMENT

I

The seizure of the gasoline ration documents in question was the result of an unjustifiable, unreasonable and exploratory search in violation of the guaranties under the Fourth Amendment.

This Court has construed the Fourth and Fifth Amendments in a series of cases since 1885.

Boyd v. *United States*, 116 U. S. 616 (1886);
Adams v. *New York*, 192 U. S. 585 (1904);
Weeks v. *United States*, 232 U. S. 383 (1914);
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 (1920);
Gouled v. *United States*, 255 U. S. 298 (1921);

Burdeau v. *McDowell*, 256 U. S. 465 (1921);
Carroll v. *United States*, 267 U. S. 132 (1925);
Agnello v. *United States*, 269 U. S. 20 (1925);
Byars v. *United States*, 273 U. S. 28 (1927);
Marron v. *United States*, 275 U. S. 192 (1927);
Go-Bart Co. v. *United States*, 282 U. S. 344 (1931);
United States v. *Lefkowitz*, 285 U. S. 452 (1932).

The Fourth Amendment was designed to prevent general exploration searches such as were made by the British in pre-Revolutionary days under authority of writs of assistance. The historical background of that amendment and the interrelationship between the Fourth and Fifth Amendments has been lucidly set forth in the opinion of Mr. Justice Bradley in *Boyd* v. *United States*, *supra*, 116 U. S. 616.

Since the decision of this Court in *Boyd* v. *United States*, *supra*, certain clear doctrines applying the Fourth and Fifth Amendments to specific kinds of search and seizures have been announced by this Court in subsequent decisions.

Throughout all these cases the Court in applying the constitutional rights of the citizen has jealously guarded his home, his office and indeed his entire premises and effects from unlawful entry and unreasonable search and seizure. This Court has consistently condemned any encroachments under "color of Federal office". It has consistently construed the Fourth Amendment to protect the citizen from disorderly intrusion or irresponsible administrative officers.

A review of the cases applying the constitutional guaranties reveals that the following principles have been established:

(1) That the guaranties of the Fourth and Fifth Amendments are liberally construed in favor of the accused.

As this Court stated in *Byars* v. *United States, supra*, 273 U. S. 28, 32:

> "Constitutional provisions for the security of person and property are to be liberally construed and 'it is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon' *Boyd* v. *United States*, 116 U. S. 616, 635; *Gouled* v. *United States*, 255 U. S. p. 304."

(2) The protection of the Fourth Amendment extends to offender as well as the law abiding.

United States v. *Lefkowitz, supra*, 285 U. S. 452, 464;
Weeks v. *United States, supra*, 232 U. S. 383.

(3) That corporations are entitled to the protection against unlawful searches and seizures prohibited by the Fourth Amendment.

Hale v. *Henkel*, 201 U. S. 43 (1906);
Silverthorne Lumber Co. v. *United States, supra*, 251 U. S. 385.

We mention particularly this well-established doctrine because the Solicitor General in his brief in opposition to petitioner's application for a writ of certiorari noted that the gasoline station which was searched in this case was owned by a corporation and not by petitioner (Brief for the United States in opposition, p. 9). The Solicitor General pointed out that this fact was not stressed in the opinion of the court below.

Obviously, this fact has no bearing upon the question involved and requires no stressing.

(4) Unlawful searches are not validated by the fact that they disclose violations of a Federal statute.

In *Byars* v. *United States, supra*, 273 U. S. 28, this Court said (p. 29):

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

(5) An arrest may not be used as a pretext to search for evidence.

> *United States* v. *Lefkowitz, supra*, 285 U. S. 452, 467.

In all of its decisions this Court has given clear notice that it will give the fullest practical effect to the constitutional guaranties.

In passing upon the reasonableness of a particular search, this Court stated explicitly:

> "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."

> *Go-Bart Co.* v. *United States, supra*, 282 U. S. 344, 357.

In the case at bar the trial judge denied the motion to suppress the gasoline documentary stamps which the petitioner contended was obtained as a result of an unreasonable search and seizure, on the ground that there had been voluntary consent to the search (R. 124). This finding of the trial court is so contrary to the government's own evidence that it requires only passing reference. It is true the petitioner did not physically resist the entry of the agents into his private office. He had little or no choice. He was confronted by two city detectives and three agents of the Office of Price Administration who proclaimed and demanded their absolute right to enter his private office. Under such circumstances the petitioner had the choice of preserving simultaneously his physical and his constitutional rights. His decision in these perplexing circumstances to avoid physical harm and injury did not amount to an invitation to enter and search.

Gouled v. *United States, supra,* 255 U. S. 298;
United States v. *Maresca,* 266 F. 713 (S. D. N. Y. 1920);
United States v. *McCunn,* 40 F. (2d) 295 (S. D. N. Y. 1930).

The Circuit Court of Appeals in its opinion in this case declared that it need not decide that the finding of the trial judge is wrong with the following qualification,

> "but we must own to some doubt whether a consent obtained under such circumstances should properly be regarded as 'voluntary' " (R. 160).

Despite this statement by the Circuit Court of Appeals, the Solicitor General in his brief in opposition to petitioner's petition for a writ of certiorari urged again that

the consent of the petitioner to the search and seizure should be deemed to be voluntary because the property which the officers were seeking to examine belonged to the Government. This contention is obviously a juggling of words. A consent is either voluntary or involuntary and the hybrid form of consent urged by the Solicitor General has no support in any decision by any court.

Moreover as pointed out by Circuit Judge Frank, in his concurring opinion in this case, this contention of the government is simply a variant of the argument urged by the government at the pre-trial hearing and upon which the government chiefly relied to support the vicious search and seizure involved in this case (R. 165).

The main contention of the government in the trial court was as follows: Whenever the government validly regulates any business and includes in its regulations a valid requirement that records be kept which shall be open to official inspection, then refusal to produce the records for such inspection authorizes the officers to enter the premises and seize the records. The United States Attorney argued vigorously and strenuously that the officers could enter the petitioner's premises with guns and ammunition and force "everybody to lay down and search the place without a warrant" (R. 10). This contention was strongly rejected by the Circuit Court of Appeals. Circuit Judge Learned Hand wrote as follows:

> "We are very clear that to continue in a business after it has been regulated, as the dispensing of gasoline was regulated, does not expose the dealer to any general search; and that in so far as the prosecution in this case so asserts—as we understand it to do—it must fail" (R. 162).

Circuit Court Judge Frank wrote a concurring opinion only because he thought it was important to underscore the Court's rejection of the main contention of the government (R. 165).

We have therefore this anomalous situation: The Circuit Court of Appeals rejected in effect the finding of the Trial Court as to voluntary consent. It also rejected the government's main contention urged in support of the search and seizure.

The Circuit Court of Appeals however held that the search and seizure was "reasonable" in the ordinary constitutional sense (R. 162).

The Circuit Court of Appeals held that the search and seizure were justified as an incident of petitioner's lawful arrest (R. 163). It is this determination which requires close scrutiny and further discussion.

We recognize the general principle that the Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

Carroll v. *United States, supra,* 267 U. S. 132, 147.

This Court has also recognized the right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place *where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed,* as well as weapons and other things to effect an escape from custody.

Agnello v. *United States, supra,* 269 U. S. 20, 30.

It has been stated that the search can include "all parts of the premises used for the unlawful purpose" and the

objects sought must be "in the immediate possession and control" of the accused.

Marron v. *United States*, 275 U. S. 192, 199.

Separated from the factual situations involved in the cases, the above quotations are not helpful. The language used in some decisions will be found to be broader than the decisions.

As Circuit Judge Hutcheson wrote *in re*: *Ginsburg*, 147 F. (2d) 749 (C. C. A. 2nd, 1945 at p. 750).

> "Based on the Fourth and Fifth Amendments, this is another of those cases in which appellant and appellee, concerning themselves little with the Constitutional words, seize upon particular words in particular cases to roll them as sweet morsels under their tongues."

What is the criterion by which unreasonableness is determined? The Court below has labeled the search involved in the present factual situation as "reasonable" in the "ordinary constitutional sense" (R. 162). The Circuit Court of Appeals has also concluded that the coupons seized were "the direct means of committing the offenses" (R. 163).

Where is the line to be drawn as to whether an object is one with which the crime was committed or whether it is merely evidence of the crime and hence not a proper object of search? The Circuit Court of Appeals in another case held that it would be hazardous to attempt any definition. *United States* v. *Kirschenblatt*, 16 F. (2d) 202, 204 (C. C. A. 2nd, 1926).

Obviously, labels cannot answer the questions involved in this case. This Court has uniformly condemned general exploratory searches such as the vicious type involved in

this case, although the search pretended to follow a lawful arrest.

In *Agnello* v. *United States, supra,* 269 U. S. 20, the facts were similar to the case at bar. Certain defendants were observed by the officers to be making sales of narcotics and were immediately arrested. After the arrest the officers went to the home of the defendant Agnello and without a warrant, searched his room and found a can of cocaine. Objection to its introduction in evidence was first sustained but later in rebuttal, it was admitted. This was held to be by this Court reversible error, the entire scope of the Fourth and Fifth Amendments is discussed and the conclusion reached: (1) that the protection of the Fourth Amendment extends to all those justly suspected or accused as well as the innocent, and that the search of a private dwelling without a warrant is unreasonable and abhorrent to our laws; and (2) that when properly invoked the fifth Amendment protects every person from incrimination by the use of evidence obtained by a search or seizure made in violation of his rights under the fourth Amendment.

Another application of the rule in the *Agnello* case is to be found in *Go-Bart Co.* v. *United States, supra,* 282 U. S. 344.

In *Carroll* v. *United States, supra,* 267 U. S. 132, where this Court justified a search and seizure without a warrant, it recognized the necessary difference between the search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and the search of a ship, motorboat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

The decision that should control this case is *United States* v. *Lefkowitz, supra,* 285 U. S. 452. Indeed, this case differs

in its essential facts from that one so slightly, that what was said in that opinion in characterizing the search made, must apply with equal force to this one. In the *Lefkowitz* case respondents were arrested in the execution of a valid warrant. After the arrest of the respondents the officers not only searched their person but opened and examined and took the contents of the desks of two rooms divided by a partition. The search was made in the room 10 feet wide by 20 feet long in which the respondent was arrested.

In discussing the validity of the search and seizure, Mr. Justice Pierce Butler wrote as follows (p. 464):

"* * * The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States* v. *Kirschenblatt*, 16 F. (2d) 202, 203. *Go-Bart Co.* v. *United States, supra*, 358.

Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search

warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States*, 255 U. S. 298, 310."

The search and seizure were held by this Court to be unreasonable.

In *United States* v. *1013 Crates of Whiskey Bottles*, 52 Fed. (2d) 49 (C. C. A. 2d 1931) property which was admittedly contraband was seized without a search warrant. The agent sought to justify the search as an incident to a lawful arrest. Condemning the search and discussing the extent of a search permissible after a lawful arrest, Circuit Judge Chase wrote as follows (p. 51):

> "Such searches are reasonable when they are fairly within the category of mere incidents of the arrest for the purpose of securing the safety of the officers, as when concealed weapons may be possessed, or for getting the subject-matter or evidence of the crime for which the arrest has been made. They are unreasonable and, because so, unlawful, when the arrest may fairly be said to have been but an excuse for a general exploratory search. Such searches are uniformly without the law, whether conducted under the pretended authority of a search warrant or in the guise of a mere incident of a lawful arrest. *Go-Bart Co.* v. *United States*, 282 U. S. 344."

In *United States* v. *Mills*, 185 Fed. 318 (D. C. N. Y. 1911), the defendants had been lawfully arrested for a conspiracy to avoid the customs law. At the time of their arrest the United States Marshal searched for, seized and removed from the premises a quantity of documents concerning the alleged fraudulent importation and all other business of

defendants. Subsequently these papers came into the possession of the United States Attorney. Upon petition the return of all seized papers was directed, Lacombe, *D.J.*, holding that such a comprehensive seizure of documentary evidence in the premises where an arrest is made constituted an unreasonable search and seizure in violation of the Fourth and Fifth Amendments.

The subsequent history of the case is illuminating. It came to this Court upon a writ of certiorari and this Court dismissed the writ for lack of jurisdiction *Wise* v. *Mills*, 220 U. S. 549 (1911); see also *Wise* v. *Henkel*, 220 U. S. 556 (1911). In its decision this Court intimated that were the case properly before the Court, it would affirm the Court below, because the search and seizure were unreasonable. Thereafter, a writ of error was dismissed by the Circuit Court of Appeals of the Second Circuit for the reason that the order was interlocutory but that Court also stated that it did not approve of unlimited exploratory searches (189 Fed. 583).

See also, *Flagg* v. *United States*, 233 Fed. 481 (C. C. A. 2, 1916); *United States* v. *Mounday*, 208 Fed. 186 (D. C. Kansas, 1913).

In Re: *Ginsburg*, *supra*, 147 F. (2d) 749, the appellant was arrested for the crime for having accepted a bribe. At the time of his arrest the officers searched the apartment in which the appellant was arrested and found large boxes, two of them locked. The officers supposed that these boxes contained further bribe money and proceeded to take and break them open, finding additional cash and securities totalling $73,955. The search was held to be unreasonable because there was no showing that the cash and securities found had any relation to the crime charged.

The Circuit Court in its decision in this case relied chiefly upon a decision of this Court in *Marron* v. *United States*,

275 U. S. 192. It is our submission that this decision has been misapplied and misinterpreted by the Court below. In the *Marron* case officers executing a search warrant for intoxicating liquors found and arrested one Birdsall who, in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest, the officers seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register, which this Court found were in plain view of the officers.

In the *Marron* case the petitioner was charged with the offense of maintaining a nuisance, a specific and new crime created by the Prohibition Amendment. The entire premises and all of its contents were part and parcel of the nuisance. Because of the very nature of the crime everything in the premises became an instrument of the crime. This Court held simply that the officers could search and seize the things plainly visible by which the nuisance was being maintained.

By that decision this Court did not mean to sanction general exploratory searches for evidence. The fact that this Court in two subsequent decisions interpreted its own ruling in the *Marron* case is indicative of the fact that this Court intended that the doctrine of the *Marron* case be strictly limited to the precise facts involved. See, *Go-Bart Co.* v. *United States, supra,* 282 U. S. 344, 358. *United States* v. *Lefkowitz, supra,* 285 U. S. 452, 465.

This Court's own explanation of its ruling in the *Marron* case is as follows (*United States* v. *Lefkowitz, supra,* 285 U. S. 452, 465):

> "These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the *Marron* Case. There, prohibition officers lawfully on the premises searching for liquor

described in a search warrant, arrested the bartender for crime openly being committed in their presence. *He was maintaining a nuisance in violation of the Act.* The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises and other transactions including the keeping of accounts. *The ledger and bills being in plain* view were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense. The bills were deemed so closely related to the business that it was not unreasonable to consider them as employed to carry it on. While no use was being made of the book or papers at the moment of the arrest, they—like containers, chairs and tables for customers, the cash register, glasses, and supplies—were kept to be utilized when needed. The facts disclosed in the opinion were held to justify the inference that when the arrest was made the ledger and bill were in use to carry on the criminal enterprise." (Italics ours.)

With due respect to very learned lower court, this is not the first time that the court below has misconstrued or misapplied the doctrine of the *Marron* case.

In *United States* v. *Poller*, 43 F. (2d) 911, 913 (C. C. A. 2d, 1930), the lower court admitted that the question to what extent the premises under the direct control of a man arrested may be searched was a troublesome one.

In *United States* v. *Kirschenblatt*, 16 F. (2d) 202 (C. C. A. 2d, 1926), the lower court limited the extent of the search permissible. However, in a subsequent case, *United States* v. *Gowen*, 40 F. (2d) 593, 598 (C. C. A. 2d, 1930) the Court overruled its own decision in *United States* v. *Kirschen-*

blatt and justified its action on the decision of this Court in *Marron* v. *United States; supra,* 275 U. S. 192.

The subsequent history of the *Gouen* case is important. It was reversed by this Court in *Go-Bart Co.* v. *United States, supra,* 282 U. S. 344.

The lower court admits that there is confusion between cases in other circuits (43 F. (2d) 911, 913) and in its decision in this case confessed that the zone within which a person allegedly arrested for a crime may be searched is undefined (R. 163).

The lower court by its decision in *United States* v. *Lindenfeld,* 142 F. (2d) 829 (C. C. A. 2d, 1944) and by its decision in this case has seriously limited the application of the fourth amendment. This result has been accomplished by extending the zone which may be searched after arrest and by drawing subtle and fine distinctions between "means of committing" a crime and "evidence" of the crime. In other words, the fourth amendment has been emasculated and stripped of its efficacy by the use of stigmatizing labels.

Neither the provisions of the fourth amendment, nor its history or any decision of this Court justify the bold, wilfull and deliberate acts committed by the officers in this case.

When two of the officers induced a female employee not in the presence of petitioner, to make two separate sales of gasoline at "over the ceiling" prices and without coupons, the officers had all the proof they needed of the possible commission of a misdemeanor. The officers were in possession of the marked bills and a memorandum of the sales made by the employee (R. 24).

There was certainly no justification for the search of the petitioner's automobile upon his return to the filling station (R. 56). Petitioner was taken to his office by two

of the officers and threatened and questioned for more than an hour. Another detective attempted to gain access to petitioner's private office, which was locked, by forcing the window (R. 37).

Is there any justification for such brazen conduct? Is there any justification for the ransacking of petitioner's private safe?

The lower court argues that the officers prior to the search must have presupposed that somewhere the petitioner must have a quantity of contraband coupons corresponding to those which he had not taken from his customers, for otherwise he would have been unable to replenish his tanks (R. 163). Are the rights of the petitioner to be determined by supposition?

In *Agnello* v. *United States, supra,* 269 U. S. 20, 33, this Court wrote as follows:

> "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

The officers had no prior knowledge or information that the petitioner had a quantity of gasoline coupons in his possession. Cf. *Carroll* v. *United States, supra,* 267 U. S. 132.

Moreover, it is admitted that the coupons were not plainly visible. They were not at or near the gasoline pumps. They were not on the top of any desk. They were in the safe of a locked private office removed from the petitioner's place of arrest.

Indeed, in every case, including the *Lefkowitz* and *Go-Bart* cases, the officers must have presupposed that the

accused had records or other documents in his possession. But did such a presupposition warrant a general and exploratory search?

The officers had ample opportunity to obtain a search warrant. The records of the petitioner could have been subpoenaed under the regulations and failure to produce the records carried severe penalties.

Is security against unlawful searches dependent upon the "sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime"? Please see, *United States* v. *Lefkowitz, supra,* 285 U. S. 452, 464.

The lower court argues that the gasoline coupons were the direct "means of committing" the offense, and therefore, an extended and thorough search for them was permissible (R. 163).

It should be noted that the misdemeanor allegedly committed in the presence of the officers was the sale of gasoline at excessive prices without coupons. Incidentally, it should be noted, in fact, it should be stressed, that petitioner was never charged with this offense.

The conclusion of the lower court is based upon a doubtful syllogism. The lower court argues that the petitioner must somewhere have a quantity of coupons in his possession, corresponding to those which he had not taken from his customers, for otherwise he would not have been able to replenish his tanks; therefore, the coupons were the direct "means of committing" the offense (R. 163).

It does not necessarily follow that because the owner of a gasoline station makes two sales without coupons, that he must have contraband gasoline coupons in his possession. It might mean merely that the owner of the station could not get as much gasoline as he needed from his sup-

plier for he would have less coupons to surrender. There are several other possibilities.*

By the standard adopted by the lower court, there are very few records or documents which would not come within the definition or classification. By the Court's definition, the scope of the search has been arbitrarily enlarged and the line of demarcation between reasonable and unreasonable searches vanishes.

To sanction such interpretation would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibition of the Constitution intended for the protection of the people against such unauthorized action. *Weeks* v. *United States*, 232 U. S. 383, 394.

If the labeling of an object as an "instrument" or "fruit" of crime can thus determine whether a search falls within or without the prohibitions of the fourth amendment, it is extremely important that these phrases be clearly and explicitly defined. There is certainly no such definition in the statute (Section 612, Title 18, U. S. C. A.) referred to by the lower court in its opinion (R. 163).

As appears from the decisions of this Court, searches for "instruments" or "fruits" of crime referred to searches "such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the

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* Upon the trial the petitioner explained the circumstances surrounding the possession of the gasoline coupons. He testified that his regular customers left with him their gasoline coupons lawfully issued to them (S. M. 430). Petitioner in turn gave to each of his customers a receipt specifying the number and type of coupons left with him (S. M. 425-426). These receipts were surrendered upon the delivery of gasoline (S. M. 426-427). The petitioner was corroborated by four of his regular customers, including an employee of the Department of Parks of the City of New York and a practicing physician (S. M. 490-497). Please Note: The references (S. M.) are to the stenographer's minutes, the original of which were filed with the Circuit Court of Appeals. The appeal in the lower court was heard upon the original minutes and the appendix to Petitioner's brief.

Government, to discover property concealed to avoid payment of duties for which it is liable" or searches made for the "seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime". *United States* v. *Lefkowitz*, *supra*. 285 U. S. 452, 465-466.

Perhaps the best clue to the solutions of the question involved is the conceded fact that petitioner was never arrested for the sale of gasoline without coupons or the excessive prices but for the possession of the unlawful coupons which were discovered as the result of the exploratory search (R. 71-72). Although the officer allegedly told petitioner that he was under arrest immediately after the sales made by the female attendant (R. 65), he was never told of the nature of the alleged charge against him until after the discovery of the coupons in the safe in petitioner's private office (R. 71-72).

Therefore, upon the record of this case and the admissions of the officers, the search actually preceded the alleged arrest.

United States v. *Sully*, 56 F. Supp. 942 (S. D. N. Y. 1944).

In the instant case no search warrant had been obtained by the officers (R. 69). Nor is there any authority under the provisions of Section 612 (2) Title 18, U. S. Code for the issuance of a search warrant in cases involving the commission of misdemeanors. By special provision, the issuance of search warrants has been authorized in cases of the commission of certain misdemeanors such as the violation of the Prohibition Amendment (Section 39, Title 27, United States Code). *In Re Hollywood Cabaret*, 5 F. (2d) 651 (C. C. A. 2d, 1925).

Other statutes, which by specific provisions authorize the issuance of search warrants are Section 173 of the Criminal Code dealing with search warrants for suspected counterfeits (Section 287, Title 18, United States Code), and violations of the Customs Law, Section 1595, Title 19, United States Code.

In 1940, the issuance of search warrants was authorized in connection with the new offense outlawing subversive activities (Section 12, Title 18, United States Code).

There is no authority for the issuance of a search warrant except as specifically authorized by statute.

In Re No. 32 East Sixty-Seventh Street, 96 F. (2d) 153 (C. C. A. 2d, 1938), the Court set aside a search warrant issued in connection with the offense of smuggling and concealing merchandise on the ground that such offense was only a misdemeanor and therefore no search warrant could be issued under any of the above statutes.

In the instant case there is no provision in the statute creating the Office of Price Administration or any regulation which authorizes the issuance of any search warrant upon proof of violation of any of the regulations.

It therefore logically follows in view of the decision of this Court in *United States* v. *Lefkowitz, supra,* 285 U. S. 452, the authority of the officers to search petitioner's place of business certainly was no greater than that which could be conferred by a search warrant issued upon adequate proof. In view of the fact that no search warrant could be issued for the alleged commission of a misdemeanor, then certainly the search and seizure complained of in this case and attempted to be justified as an incident of the arrest of the petitioner, were wholly unauthorized.

Another question presented by this case is whether, in any event, there was a lawful and valid arrest of the petitioner to justify the subsequent exploratory search.

In the first place, there is a serious question whether Office of Price Administration agents have the authority as peace officers to make arrests (Please see, Section 53a of Title 18, U. S. C. A.).

Secondly, the circumstances surrounding the alleged arrest deserves mention.

It is conceded that the petitioner was not taken on the day of his alleged arrest to any police precinct or to the United States Commissioner. Instead he was taken to the Office of Price Administration where he was questioned by a Mr. Burchill (R. 46, 47). The petitioner was released from custody on that day and told to go home (R. 50). The petitioner was not actually lawfully arrested or arraigned before a Commissioner until after a month later (R. 50). It is clear therefore, that in the first place there was no lawful arrest of the petitioner to justify any search. The requirements for a lawful arrest are clearly stated in the recent decision of this Court in *McNabb* v. *United States*, 318 U. S. 332, 342:

> "Congress has explicitly commanded that 'It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial * * *.' 18 U. S. C. §595. Similarly, the Act of June 18, 1934, c. 595, 48 Stat. 1008, 5 U. S. C. §300a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that 'the person arrested shall be immediately taken before a committing officer.' Compare also the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, 18 U. S. C. §593, which provides that when arrests are

made of persons in the act of operating an illicit distillery, the arrested persons shall be taken forthwith before some judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest."

The Government is estopped both as a matter of law and as a matter of justice of attempting to justify the search and seizure on the ground of a lawful arrest.

The lower court's contention is very clearly answered by the following portion of the opinion of the New York Court of Appeals in *People* v. *Marendi*, 213 N. Y. 600, 608:

> "'Arrest is the taking of a person into custody that he may be held to answer for a crime.' (Code of Criminal Procedure, section 167.) The defendant was not taken into custody by Officer Murtha 'that he might be held to answer for a crime,' but only that he might be searched."

In the *Marendi* case, the Court of Appeals also wrote that a person arrested must be informed of the cause of the arrest. A police officer "can not arrest a man for one cause, and, when that is exploded, justify for another. Such a doctrine would be an incentive to the loosest practices on the part of public officers and a dangerous extension of their sufficiently great powers. They cannot be too firmly told that there is no such lawful thing as an arrest without an apparent or disclosed cause, to be justified thereafter by whatever may turn up." (213 N. Y. 600, 610.)

In conclusion the following remarks by Mr. Justice Sutherland in *Byars* v. *United States*, 273 U. S. 28, 33, are particularly appropriate:

"The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

We respectfully submit that the searches and seizures here challenged must be held violative of petitioner's rights under the Fourth and Fifth Amendments.

CONCLUSION

The judgment of conviction should be reversed and the information dismissed.

Respectfully submitted,

IRVING SPIELER,
Attorney for Petitioner.

SAMUEL MEZANSKY,
MOSES POLAKOFF,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 404

JACK DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 210-216) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 8, 1945 (R. 217). The petition for a writ of certiorari was filed September 6, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the ration coupons introduced in evidence against petitioner were obtained as the result of an unreasonable search and seizure.

STATUTE AND REGULATIONS INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction,

be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

Ration Order 5C issued by the Office of Price Administration (7 F. R. 9135 ff. as amended) provides in pertinent part as follows:

Section 1394.8153. (a) *Coupons issued for registered and commercial motor vehicles.* Transfers may be made and accepted under the following conditions in exchange for Class A, B, C, D, or T coupons having an aggregate unit value equal to the amount of gasoline transferred. However, if the transferee is able to accept only a portion of the amount of gasoline represented by the unit value of the coupon, the transferor shall nevertheless require the surrender of an entire coupon.

* * * * *

Section 1394.8217. (a) Every dealer and intermediate distributor shall be accountable for all gasoline ration credits, gasoline deposit certificates, coupons and other evidences received by him. Gasoline deposit certificates, coupons and other evidences received at or for a place of business shall be, at all times when the dealer or distributor is open to transact business, retained by him at the place of business for which they were received, or deposited in a ration bank account maintained for that place of business, until such time as they are surrendered to a dealer or distributor in exchange for gasoline, or

otherwise surrendered pursuant to Ration Order No. 5C. The aggregate gallonage value of gasoline deposit certificates, coupons and other evidences on hand or on deposit for each place of business of a dealer or intermediate distributor, shall, at all times, be equal to, but not in excess of, the number of gallons of gasoline which would be required to fill the storage capacity of such place of business, as shown by the current certificate of registration, * * *

Section 1394.8235 (b). All tire inspection records and gasoline deposit certificates and all coupon books, coupons, and other evidences are, and when issued shall remain, the property of the Office of Price Administration. Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law enforcement officer of the United States or of any state, county, or local government, every person shall produce for inspection any tire inspection record and gasoline deposit certificate and any gasoline coupon books, coupons, and other evidences in his possession or control, whether valid, invalid, void or expired, and whether or not issued or acquired in accordance with Ration Order 5C. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States, or of any state, county or local government are authorized

to make such inquiries of any person as may be pertinent to determine whether a violation of Ration Order No. 5C has been or is being committed, and are authorized to receive the surrender of all gasoline deposit certificates, gasoline coupon books, coupons and other evidences acquired by any person otherwise than in accordance with Ration Order 5C, whether valid, invalid, void or expired.

STATEMENT

Petitioner was convicted in the District Court for the Southern District of New York on a charge of unlawfully possessing 168 gasoline ration documents consisting of "A" coupons in sheet form (R. 4, 189). He was sentenced to imprisonment for six months and to pay a fine of $1,000 (R. 191). On appeal, the judgment was affirmed (R. 2, 17).

The only question raised concerns the validity of the search by which the ration coupons, which were introduced in evidence, were obtained. The facts in respect of that issue were developed at a pretrial hearing before the court without a jury on a motion to suppress (R. 7–8, 11–18). The evidence adduced at that hearing, taking the view most favorable to the Government,[1] may be summarized as follows:

[1] At the conclusion of the hearing the trial judge stated that he credited the Government's witnesses (R. 157).

On June 20, 1944, two detectives of the New York City police and three O. P. A. investigators drove near the gasoline station owned by the corporation of which petitioner was president (R. 18–19, 27, 163). One of the O. P. A. investigators, Sussman, took a marked $5 bill and drove into the station (R. 19, 29–30). He told the woman attendant in charge that he wanted his tank filled but had no coupons (R. 69). She sold him 11.8 gallons of gas for which she charged him $4.82, twenty cents per gallon above the ceiling price. Sussman paid for the gasoline with the marked $5 bill (R. 69–70, 95–97). The attendant wrote on a piece of cardboard the price charged for the gasoline (R. 71, 78–79, 96). A short time later another O. P. A. investigator, Pearman, also took a marked $5 bill and drove to the station (R. 29, 81). He purchased five gallons of gasoline without giving coupons therefor, at twenty cents per gallon above the ceiling price (R. 103–104).

A short time later, all five officers returned to the premises and questioned the attendant (R. 20, 31, 71). She stated that petitioner told her she could sell gasoline without demanding coupons to anyone whom she knew or whom he recommended (R. 21, 73, 84). At the officers' request she took from her pocket the money she had collected, including the marked $5 bills, and the slip of paper on which she had noted the money collected

(R. 20, 22, 31, 36–37, 71, 73, 79, 83–84). The officers told the attendant she was under arrest (R. 50, 51, 105).

While the officers were questioning the attendant, petitioner drove up (R. 22, 37, 73, 84). He was confronted with the attendant, who repeated her account of petitioner's directions to her (R. 23–38, 74, 85). Petitioner was told he was under arrest (R. 25, 50, 67–68, 73, 84). One of the officers examined petitioner's car and asked petitioner where he kept the coupons received for the sale of gasoline. Petitioner stated that the coupons were in small metal containers attached to the gasoline pumps. He gave the agents the key to the boxes. (R. 23.) While talking with the officers, petitioner walked away and handed some keys to Payne, his partner in the tire business (R. 74, 85, 125). Payne was followed by one of the O. P. A. investigators (R. 74, 85).

One of the O. P. A. investigators measured the contents of the gasoline tanks and counted the stamps in the containers (R. 23). His tabulations revealed that petitioner did not have in the containers stamps sufficient to account for the difference between the storage capacity of the tanks and the gasoline actually contained therein (R. 23–24; see also R. 42–46).

While the investigator was making the tabulation, Detective Fitzpatrick and an O. P. A. agent

took petitioner to the office of the gasoline station (R. 40). They remained in the waiting room adjoining petitioner's private office, the door of which was locked (R. 40, 75, 86). The detective endeavored to persuade petitioner to open the door of his private office, telling him that he was already under arrest for having sold gasoline at above ceiling prices, and that he would fare better if he cooperated with the officers (R. 25–26, 40–42, 67–68, 87, 92–93). At one time petitioner asked how many coupons he was short, and when told that the number was about 1,100, he stated, "I have enough to cover that" (R. 42). While Fitzpatrick was talking to petitioner, they saw the other detective flashing his light through the window in the door leading into the private office. At that point petitioner agreed to open the door of the office. (R. 48.) He took the keys from the O. P. A. agent who had followed Payne, and opened the door. He gave the agents several envelopes, which he removed from a metal cabinet in the office, and which contained ration coupons, including those which formed the basis of the count of the information on which he was convicted. (R. 26, 47, 57–60, 75–76, 87–89.)

Petitioner was then taken to the O. P. A. office in New York and questioned there (R. 60–62). The enforcement attorney directed the detective to book petitioner (R. 62–63), but on the way out petitioner said that he would make a further state-

ment (R. 63–64). He was allowed to go home when he promised to aid the Government in locating the seller of the ration stamps (R. 63–64, 66).

The trial judge denied the motion to suppress on the ground that there had been voluntary consent to the search (R. 157). The circuit court of appeals expressed some doubt as to the voluntariness of petitioner's consent (R. 211), but held that the search was nevertheless a reasonable one (R. 211–215).

ARGUMENT

1. Petitioner challenges (Pet. 13–15, 18–27) the holding of the court below that the ration coupons introduced in evidence were obtained as the result of a lawful search. The circuit court of appeals based its ruling on the well established principle that, as an incident to a lawful arrest, the premises where the arrest is made may be searched for the instrumentalities of the crime. *Marron* v. *United States*, 275 U. S. 192, 199; *Agnello* v. *United States*, 269 U. S. 20, 30; *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. C. A. 2), certiorari denied, 323 U. S. 761. Although the fact was not stressed in the opinion of the court below, it should be noted that the gasoline station which was searched was owned by a corporation, not petitioner (R. 163). The O. P. A. investigators had witnessed offenses committed by the corporation through its agent, the station attendant, who had been authorized by petitioner

to sell gasoline without receiving coupons. They therefore had authority, as private citizens, to arrest and did arrest the attendant, and petitioner, the responsible officer of the corporation which committed the crimes.[2] As incidental to that arrest, they clearly had authority to examine the coupons in the containers attached to the pumps and to measure the amount of gasoline in the tanks, and, in fact, petitioner consented to the examination of those coupons. The discrepancy between the coupons found at the pumps and the amount of gasoline sold indicated that there must be other coupons on the premises. To be able to sell gasoline without receiving coupons, the corporation, if it intended to continue in business, would be obliged to obtain coupons from some source other than its customers, for it needed coupons

[2] Section 183 of the New York State Code of Criminal Procedure provides that a private person may arrest another for a crime committed or attempted in his presence, and Section 185 provides that the person so arrested must, without unnecessary delay, be taken before a magistrate or delivered to a peace officer. Here, the persons arrested were immediately delivered to the peace officers, the New York City detectives who accompanied the investigators. The act of selling at prices above ceiling is a violation of New York as well as federal law, for the State of New York has made violations of federal price regulations a state crime. New York State War Emergency Act Laws of 1942, c. 544, as amended; Resolution of the New York State War Council, issued April 28, 1943; see also Local Law No. 35 of the Laws of New York City for 1945, which penalizes violations of federal rationing and price regulations. Pike and Fischer, *O. P. A. Price Service, General Desk Book 1*, pp. 5981–5983.

to purchase more gasoline (see R. 45). The inference that the corporation had other illegally acquired coupons was fortified by petitioner's own admission that he had coupons to cover the shortage. Under such circumstances illicit coupons were, as the court below held, the direct means of committing the crime witnessed by the investigators (R. 214), as vital a factor in the criminal enterprise as the ledger seized in the *Marron* case or the physician's cards seized in the *Lindenfeld* case, *supra*. The search for the coupons in premises under the immediate possession and control of the corporation in the place where the offense was committed and the arrests made, was therefore a reasonable one under the *Agnello* and *Marron* decisions, *supra*. This was not a situation where there was no lawful arrest, as in *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, or where the officers engaged in a general exploratory search for whatever evidence they might find, as in *United States* v. *Lefkowitz*, 285 U. S. 452. Here, pursuant to a lawful arrest, there was a search, not for evidence, but for the instrumentalities of the crime.

2. Although the circuit court of appeals found it unnecessary to decide the point, we think that the admission of the coupons in evidence may be sustained for the reason found by the district court, that petitioner voluntarily surrendered the coupons to the agents. The nature of petitioner's consent must be judged in relation to the fact

that the property which the officers were seeking to examine belonged neither to petitioner nor to the corporation, but to the Government, and that petitioner was required to permit inspection of such documents. See Section 1394.8235 (b) of Ration Order 5C, *supra*, pp. 4–5. We do not urge that this fact justifies a forcible search of the premises, but we do think it is an important factor to be considered in determining whether petitioner's act in turning over the coupons was a voluntary one. In attempting to persuade petitioner to permit inspection of the coupons the officers were not urging him to waive a right; they were merely insisting that he comply with his duty under the rationing regulations. And, when petitioner did finally take the ration coupons from the cabinet and give them to the officers he was doing no more than the law required him to do. This is a very different situation from one in which arresting officers during the course of an arrest examine documents which they would otherwise have no right to inspect. Here, with or without evidence of the commission of a crime, or an arrest, the officers had a lawful right to examine the government property entrusted to petitioner. In the circumstances, although petitioner's compliance with his duty was reluctant, we submit that his action in turning the coupons over to the agents was properly found by the district court to have been voluntary.

CONCLUSION

It is respectfully submitted that, for the reasons stated, the judgment below is correct and the petition for a writ of certiorari should therefore be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 404

JACK DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 159–165) is reported at 151 F. 2d 140.

JURISDICTION

The judgment of the circuit court of appeals was entered August 8, 1945 (R. 166). The petition for a writ of certiorari was filed September 6, 1945, and was granted November 13, 1945 (R. 168). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, under the circumstances, petitioner's surrender of the ration coupons received in evidence was voluntary.

2. Whether the ration coupons were, in any event, obtained as the result of an unreasonable search.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The constitutional and other provisions involved are set forth in the Appendix, pp. 29–34, *infra*.

STATEMENT

Petitioner was prosecuted by information filed in the United States District Court for the Southern District of New York for a violation of Section 2 (a) of the Act of June 28, 1940, 50 U. S. C., Appendix, Supp. IV, 633 in that on June 20, 1944, he had in his possession 168 gasoline ration documents consisting of "A" coupons and representing 504 gallons of gasoline, contrary to the provisions of Ration Order No. 5C and General Ration Order No. 8 duly issued by the Price Administrator (pp. 30–31, 32, *infra*)

(R. 3).[1] After a jury trial petitioner was convicted and sentenced to imprisonment for a term of six months and to pay a fine of $1,000 (R. 145–147). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of conviction was affirmed (R. 159–166).

At the trial, the Government introduced in evidence the ration documents which form the basis of the conviction (see Pet. Br. 7).[2] The only question here involved is whether the documents were obtained as the result of an illegal search and seizure. The facts relating to this question were developed at a pretrial hearing before the district court without a jury on petitioner's motion to suppress the evidence (R. 5–13). The evidence adduced at that hearing, taking the view most favorable to the Government (cf. *Glasser* v. *United States*, 315 U. S. 60, 80),[3] may be summarized as follows:

In June 1944, petitioner was president of the Davis Auto Laundry Corporation. The corporation was located at 720 Southern Boulevard, New York City, and was engaged in the sale of used

[1] The information contained four counts (R. 3–5). Petitioner was found guilty on count 1 and not guilty on count 3 (R. 145); the remaining counts were dismissed on motion of the Government at the opening of the trial (R. 6, 133).

[2] The record does not contain the evidence adduced at the trial.

[3] At the conclusion of the hearing the court stated that it believed the Government's witnesses (R. 123).

cars, tires, and gasoline, and the washing and servicing of automobiles. The corporation occupied a building extending from Southern Boulevard to Bruckner Boulevard. Inside the building were four gasoline pumps in two sets; one set was near the Southern Boulevard side and the other set near the Bruckner Boulevard side. About half way in the building was petitioner's private office, adjacent to which was a waiting room (R. 22, 33, 35, 91–92, 97).

At about 11 a. m. on June 20, 1944, two New York City detectives and three O. P. A. investigators drove near the premises occupied by the corporation (R. 13–14, 20, 21, 52). Sussman, one of the investigators, marked a $5 bill and about 1 p. m. drove into the premises, stopping at the gasoline pumps on the Southern Boulevard side. There was a woman attendant in charge.[4] He told her that he wanted his tank filled and that he did not have any gasoline ration coupons. Nevertheless, she sold him 11.8 gallons of gas, for which she charged him $4.82, twenty cents above the ceiling price. Sussman paid for the gasoline with the marked $5 bill. The attendant wrote the price charged for the gasoline on a piece of cardboard, which she put in her pocket (R. 53–54, 60, 62, 73–75, 85). A short time later another of the investigators, Pearman, took a marked $5

[4] This attendant was the only employee whose duty it was to sell gasoline (R. 111).

bill and drove into the premises (R. 23, 54–55, 62–63). He purchased five gallons of gasoline without giving any ration coupons therefor, at twenty cents above the ceiling price (R. 75, 80–81). When these sales were made, petitioner does not appear to have been on the premises (R. 15, 23, 24, 52, 62, 91).

At about 1:30 p. m., the five officers entered the premises and arrested the attendant for selling gasoline without coupons and above the ceiling price (R. 14–15, 24, 39, 55, 58, 82). They did not have a warrant of arrest or a search warrant (R. 69). The officers questioned the attendant. She stated that she knew that she was "doing wrong"; that petitioner had told her that she could sell gasoline without demanding coupons at twenty cents per gallon over the ceiling price to anyone whom she knew or whom he recommended, and she was following petitioner's instructions (R. 16, 25, 55, 64, 73, 83, 87).[5] At the officer's request, the attendant surrendered the marked $5 bills and the piece of cardboard on which she had noted the money she had collected for the sales (R. 16, 24–25, 55, 63).

[5] The attendant testified at the hearing that she had been selling gasoline for petitioner in this manner for about three weeks (R. 88). She said that one of the investigators told her that petitioner had been selling him gasoline in the afternoon after she had left (R. 74, 78). As to the other investigator, it appears that after she had sold him the gasoline, he informed her that he could not find his coupon (R. 80).

At about 2:00 p. m., petitioner drove into the premises (R. 17, 28–29, 55). The attendant identified petitioner to the officers, and one of the police officers and one of the investigators placed him under arrest on the charges of selling gasoline without collecting ration coupons and for selling gasoline at a price over the ceiling price (R. 17, 19, 29, 39, 51–52, 56, 64–65, 72). Petitioner was confronted with the attendant, who repeated her account of petitioner's directions to her (R. 17, 29, 56, 65). The officers then asked petitioner what the capacity of the tanks of the gasoline pumps was and where he kept the ration coupons he collected for gasoline sales. Petitioner said that these coupons were kept in small metal containers attached to the gasoline pumps, and handed the keys to the boxes over to the agents (R. 17, 56, 93). While petitioner was talking to the officers, he walked away and handed the keys to his private office to Payne, his partner in the tire business (R. 56, 65–66, 98–99, 100). One of the investigators followed Payne (R. 56, 66).

One of the O. P. A. investigators measured the contents of the tanks and counted the coupons in the metal containers (R. 17, 56, 96–97). His tabulations revealed that petitioner did not have in the containers coupons sufficient to account for the difference between the capacity of the tanks and the gasoline then contained in the tanks, the shortage amounting to about 1,500 gallons (R. 32, 56, 65).

While the investigator was making the tabulations, Fitzpatrick, one of the detectives, and Sussman took petitioner into the waiting room adjoining petitioner's office, the door of which was locked. They told him that the tabulations being made showed that there was a shortage of coupons. At one point petitioner asked how many coupons he was short, and when he was told that the number was about 1100 gallons, he said, "I have a sufficient amount of stuff to cover the shortage!" (R. 18–19, 30, 32, 56). Sussman informed petitioner that he had a right to see the coupons; Fitzpatrick endeavored to persuade petitioner to open the door of the office, telling him that the investigators were entitled to see the coupons, since they were Government property of which he was only the custodian, that he was already under arrest, and that he would fare better if he cooperated with the officers (R. 19, 31–32, 66–67). While these officers talked to petitioner, Colby, the other detective, flashed his light through a window of the private office, and, according to Fitzpatrick, it was his impression that Colby was trying to open the window (R. 37, 100). At this point, the time being about 3:00 p. m., petitioner opened the door (R. 19, 37, 57, 68, 100–101). He had obtained the keys from one of the investigators, who had secured them from Payne. Then petitioner removed several envelopes from a filing cabinet in the office, which

he handed over to the investigators. These envelopes contained gasoline ration coupons, including those which formed the basis of the information on which petitioner was convicted (R. 19–20, 37–38, 44–45, 68–69, 101).

At about 5:00 p. m. petitioner was taken to the local O. P. A. office, where he was questioned by the enforcement attorney (R. 46–47, 57–58). After the questioning, the attorney told Fitzpatrick to lock petitioner up, but on the way out petitioner told Fitzpatrick that he would make a further statement. He then told the enforcement attorney that he had bought the ration coupons from a man by the name of Tony, and he was permitted to go home when he promised to help the Government in locating Tony (R. 47–50, 70). Some six weeks later, petitioner was arrested on a warrant and arraigned (R. 50–51, 106).

The district judge denied the motion to suppress; he stated that petitioner had consented to the search; that the O. P. A. agents were entitled to see the coupons, had asked to see them, and eventually persuaded petitioner to permit them to see the coupons (R. 123–129). The circuit court of appeals expressed some doubt whether, under the circumstances, a finding of consent was proper (R. 160), but held that the search nevertheless was a reasonable one (R. 160–164).

SUMMARY OF ARGUMENT

I

The ration coupons involved were not petitioner's private papers. They were the property of the Office of Price Administration. The O. P. A. investigators and the police officers were authorized to inspect them on demand. Following petitioner's arrest, one of the investigators and one of the police officers communicated these facts to petitioner and induced him to surrender the coupons. Under the circumstances they were lawfully entitled to persuade petitioner to surrender the ration coupons, and in so doing, they did not invade petitioner's constitutional rights.

II

In any event, the search conducted by the officers was not unreasonable. The police officer who arrested petitioner did so lawfully. Petitioner committed a misdemeanor in the presence of the officer; as an aider and abettor he was constructively present when the illegal sales were made. In addition, the officer had probable cause for believing that petitioner was engaged in a felonious conspiracy to sell gasoline to consumers without requiring them to surrender ration coupons therefor. In order to carry on that enterprise, it is evident that petitioner must have had ration coupons obtained from other sources, since

he could not lawfully secure gasoline from a distributor unless he gave up ration coupons. Ration coupons, therefore, were the means of committing the offense involved, and the officers were authorized to search that part of the premises used for the unlawful purpose in order to find and seize the ration coupons. Petitioner's office, which was searched by the officers and where the ration coupons seized were found, was necessarily utilized in the conduct of the illegal enterprise.

ARGUMENT

I

UNDER THE CIRCUMSTANCES OF THIS CASE PETITIONER'S SURRENDER OF THE RATION COUPONS INVOLVED WAS VOLUNTARY

Expressing some doubt whether the district court's finding that petitioner had voluntarily consented to the officers' search of his office was correct, and rejecting the prosecution's argument that since the coupons were the property of the Office of Price Administration and always open to its inspection, "the officers were free to force an entrance into any building and seize whatever coupons they might find," the circuit court of appeals nevertheless reached the conclusion that the denial of petitioner's motion to suppress was proper because the search conducted by the officers incident to petitioner's arrest was reasonable (R. 160–164). We believe that this conclusion is

correct, as we shall argue, *infra*, pp. 19–28. We shall argue first, however, as a basis for sustaining the judgment below, that the finding of consent is proper when it is considered in the light of the fact that petitioner, perhaps reluctantly, but, in any event, without forcible compulsion, permitted the officers to enter his office and surrendered the coupons to them becauses the officers had informed him that the coupons were the property of the Office of Price Administration, of which he was merely the custodian and which they had a right to inspect at any time.[6] We do not urge, of course, that the officers on that basis were entitled to force their way into the office and seize the coupons.

After the officers told petitioner, in response to his question, that he did not have enough coupons to cover the amount of gas that had been removed from the tanks, petitioner said that he had coupons to cover the shortage. The officers told petitioner that the coupons were the property of the Office of Price Administration of which he was only the custodian and that they were entitled to inspect them; and on that basis that it would be the better course for him to open the door to his private office. This discussion went on from three-

[6] The circuit court of appeals considered the consent issue, not from this aspect but, apparently, only on the basis that under the circumstances petitioner did not voluntarily waive his constitutional rights, stating that he "must have known, under arrest as he was, that the officers were not likely to stand very long upon ceremony, but in one way or another, would enter the office" (R. 160).

quarters of an hour to an hour, following which petitioner opened the door to his office and gave the coupons to the officers (*supra*, pp. 7–8). It is true that at this time petitioner was under arrest, that at one point during the talk one of the city detectives looked through the window of the office with his flashlight, and that, according to the other detective, he appeared to be trying to force the window (*supra*, p. 7). But, concededly, he did not force the window, and there was neither an application of physical force to petitioner nor any threat to do so.

That the information conveyed by the officers to petitioner was correct is clear. Under the provisions of the Second War Powers Act and Ration Order No. 5C imposing the rationing of gasoline, the officers were empowered, regardless of whether petitioner had committed any offense, to question him concerning ration coupons he had on the premises and to inspect the coupons on demand.[7] Section 2 (a) (3) of the Act (*infra*, p. 30) authorizes the President "to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises

[7] With the exception of the private office, the premises were open to the general public. Accordingly, the officers were lawfully on the premises, even without a warrant. See *Smith* v. *United States*, 105 F. 2d 778, 780 (App. D. C.); *McWalters* v. *United States*, 6 F. 2d 224 (C. C. A. 9); *Ludwig* v. *United States*, 3 F. 2d 231, 232 (C. C. A. 7).

or property of, any person * * *, and make such investigations, as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this subsection (a)," that subsection giving the President the power to provide for the rationing of commodities. Pursuant to the authority vested in him, the Price Administrator issued Ration Order No. 5C governing the rationing of gasoline. Under Ration Order No. 5C, gasoline ration coupons issued by the Office of Price Administration remained the property of that Office (sections 1394.8104 and 1394.8235, *infra*, pp. 31, 33–34); a gasoline dealer was accountable for coupons which he had received and had to keep them at his place of business (section 1394.8217, *infra*, p. 33); the coupons were open to inspection by any O. P. A. investigator or law enforcement officer, and these persons were authorized to inquire of any person in order to determine whether a violation of the ration order was being committed and to receive the surrender of the coupons (section 1394.8235, *infra*, pp. 33–34).

The circuit court of appeals went so far as to agree that a gasoline dealer who continues in business in compliance with the regulations of the Office of Price Administration, may be compelled by legal process to allow an inspection of all papers which the regulations subject to inspection, and that he may not object that the

inspection might disclose evidence relevant to a criminal prosecution against him (see R. 161–162). It is well-settled that records required to be kept by law and held subject to inspection are in the nature of quasi-public documents which may be inspected without invading any rights guaranteed by the Fourth and Fifth Amendments. See *United States* v. *Wilson*, 221 U. S. 361, 380–382; *Boyd* v. *United States*, 116 U. S. 616, 623–624; *Bowles* v. *Insel*, 148 F. 2d 91 (C. C. A. 3); *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774, 779–781 (C. C. A. 10); *Cudmore* v. *Bowles*, 145 F. 2d 697 (App. D. C.), certiorari denied, 324 U. S. 841; *Rodgers* v. *United States*, 138 F. 2d 992, 995–996 (C. C. A. 6); *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7), certiorari denied, 311 U. S. 690.*

Furthermore, the inspection, as well as the taking of quasi-public records, by those authorized to inspect them, has been upheld where the custodian has consented, even though the inspection or taking was not accomplished through legal process. See *Bowles* v. *Beatrice Creamery*

* In the *Boyd* case, this Court said (116 U. S. at 623–624):

"So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures."

In the *Wilson* case, the Court held that in this situation the privilege against self-incrimination has no application.

Co., supra; Bowles v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 569–571 (C. C. A. 9), certiorari denied, 325 U. S. 877, rehearing denied October 8, 1945, No. 1213, October Term, 1944; *In re Sana Laboratories*, 115 F. 2d 717, 718 (C. C. A. 3); *C. M. Spring Drug Co.* v. *United States*, 12 F. 2d 852, 857 (C. C. A. 8); *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786, 789 (C. C. A. 3), certiorari denied, 268 U. S. 688; *United States* v. *Kempe*, 59 F. Supp. 905 (N. D. Ia.); *Bowles* v. *Stitzinger*, 59 F. Supp. 94 (W. D. Pa.); *Bowles* v. *Curtiss Candy Co.*, 55 F. Supp. 527 (W. D. Mo.); *United States* v. *Sherry*, 294 Fed. 684 (N. D. Ill.). Nor do we read the opinion of the circuit court of appeals as denying this proposition.* And, at least in one case, the contention was rejected that consent must be negatived because the custodian of the records first refused to hand them over and only gave them up after disputing the government's right. *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786 (C. C. A. 3), certiorari denied, 268 U. S. 688. The facts in that case disclose that the defendant was a corporation doing business as a wholesale liquor

* In this connection the opinion merely refers to the fact that "the officers did not demand their [the coupons'] production by legal process; they took them without [petitioner's] consent" (R. 162). In the *Brayton Creamery Co.* case, while the court expressed the view that production and inspection should be compelled by lawful process, it concluded that it did not have to decide that question since the appellee had in fact consented to the inspection.

dealer under a government license. In an investigation of the corporation's conduct under the license, which the Government was making, prohibition officers demanded and received certain papers. The court said (p. 789): "* * * we find that a demand for the papers was lawfully made by prohibition officers and that, within the principle of *Wilson* v. *United States,* 221 U. S. 361, the corporation was bound to surrender them. While the corporation resisted the Government's demand and violent disputes followed, it did, nevertheless, give up the papers. We do not regard their surrender as having been made under duress, as now claimed by the corporation, but under a necessity imposed by a law. While reluctantly made, the surrender was in a legal sense voluntary. The evidence is sufficient to support this finding of fact by the trial court."

In our judgment, that decision is entirely sound. It is evident, we think, that in respect of whether a surrender of papers has been voluntary the custodian of quasi-public documents which are open to governmental inspection on demand, enjoys a less favorable position than the owner of purely private papers as to which the owner possesses the full protection of the Fourth Amendment. It may well be that in the latter case the Amendment forbids a finding of a waiver of constitutional guaranties when the owner has been persuaded to give up his private papers through the exertion of

official pressure. Cf. *Amos* v. *United States*, 255 U. S. 313. Since, under the Amendment, the Government is without any right to the papers, its officers should not be permitted to utilize their official capacity to avoid the prohibition of the Amendment. But in the other situation, the Amendment does not forbid the Government from inspecting the papers, and, surely, the Amendment does not become operative because officers of the Government, in order to procure the surrender of public documents from one reluctant to give them up, have persuaded the holder that it is his legal duty to hand them over to the Government. We do not think that when the custodian of public documents shows an unwillingness to deliver them to the Government upon the Government's lawful demand, the Government must immediately resort to process to secure compliance with its demand and that it is precluded from inducing compliance by persuasion. And, we submit that the permissible limits of persuasion have not been exceeded so long as the persuasion is not in reality a threat that physical force will be utilized to attain the ends sought.

Measured by the foregoing principles, we believe that the evidence warrants the conclusion that petitioner voluntarily consented to the surrender of the coupons involved, despite the facts that he was under arrest and that one of the officers appeared to be endeavoring to force his way

into the office. On all the evidence adduced, the district court, which heard the witnesses, concluded that petitioner had been persuaded to surrender the coupons. This appears from the colloquy which followed the taking of evidence (R. 123–129). Thus, the court stated that while petitioner tried "to hold out and prevent [the officers] from seeing the balance of the coupons or the records in his office, [they] eventually * * * persuaded him that it would be a better thing for him to permit them to examine them. * * * They talked him into it." (R. 124–125; see also R. 126.) And this statement of the district court must be read in connection with the preceding comments of the court, viz., that when the officers approached petitioner, they asked him to "disclose to them a record that he was supposed to keep, and he was supposed to have the coupons that would correspond to the gasoline which had been sold from the tanks, they were entitled to ask to see those coupons. They were part of the records. He was not permitted to keep those coupons. He was required under the regulations to turn them in when he purchased more gas from wholesalers." (R. 124.) The district court evidently was of the opinion that, although there had been an arrest and that there was testimony tending to indicate an intention by one officer to use force in securing an entry into the office, the surrender of the coupons was produced by the officers "talking" petitioner into it. And we think that

"talk," under the circumstances, was properly employed by the officers to induce petitioner to perform the obligation imposed upon him by law.

II

IN ANY EVENT, THE SEARCH FOR AND THE SEIZURE OF THE RATION COUPONS WAS NOT UNREASONABLE

The Fourth Amendment (*infra*, p. 29) provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, * * *." The circuit court of appeals concluded that the denial of petitioner's motion to suppress was proper because the ration coupons involved were obtained as the result of a lawful search (R. 162–164). It based its ruling on the well-established principle that as incident to a lawful arrest, the premises where the arrest is made may be searched for the means of committing the crime or for the instrumentalities of the crime. *Marron* v. *United States*, 275 U. S. 192, 199; *Agnello* v. *United States*, 269 U. S. 20, 30; *United States* v. *Lindenfeld*, 142 F. 2d 829 (C. C. A. 2), certiorari denied, 323 U. S. 761. The conclusion of the court below is, we submit, correct.

A. *Petitioner was lawfully arrested.*—Since an arrest to support a search must be lawful (*Marron* v. *United States, supra*, at pp. 198–199; *Agnello* v. *United States, supra*, at p. 32; *United States* v.

Lindenfeld, supra, at p. 831; *Poldo* v. *United States*, 55 F. 2d 866, 869 (C. C. A. 9); *Cline* v. *United States*, 9 F. 2d 621 (C. C. A. 9)), it is, of course, necessary to sustain the legality of petitioner's arrest, a matter not directly considered in the opinion below.[10] Presumably the circuit court of appeals thought that petitioner was lawfully arrested because in the presence of the officers he had committed the offense of selling gasoline without requiring ration coupons and at a price in excess of the ceiling price.[11] These offenses were misdemeanors.[12] An arrest without a warrant in the case of a misdemeanor cannot be made unless the misdemeanor was committed in the presence of

promptly and because he was released from custody several

[10] The circuit court of appeals stated that it accepted the finding of the district court that petitioner had been arrested (R. 160), but made no specific holding that the arrest was lawful.

We think that petitioner's argument (Br. 32-33) that his arrest was illegal because of a failure to arraign him hours after the arrest occurred, is plainly without merit. Likewise, there is no merit, we submit, in the contention (Br. 34) that because of the failure to arraign promptly and the release from custody, the Government is estopped from justifying the legality of the arrest.

[11] Thus the opinion states: "The officers had just had personal ocular evidence that Davis was selling gasoline without demanding coupons; and that he was using this forbearance as an excuse for exacting a higher price" (R. 162–163).

[12] Selling gasoline without demanding ration coupons is an offense in violation of Section 2 (a) (5) of the Second War Powers Act, and is a misdemeanor (*infra*, pp. 30–31). Selling gasoline at a price above the ceiling price is punishable under Section 205 (b) of the Emergency Price Control Act of 1942, as amended, 56 Stat. 33, 50 U. S. C. App., Supp. IV, 925 (b), by imprisonment for not more than one year.

the person making the arrest. *Carroll* v. *United States*, 267 U. S. 132, 156–157; *Holmes* v. *United States*, 11 F. 2d 569, 573 (App. D. C.). Concededly, petitioner did not personally make the sales involved, and, apparently, he was not on the premises when they were made (see *supra*, p. 5). However, we submit that petitioner committed the offenses in the presence of the arresting officers, since as an aider and abettor under Section 332 of the Criminal Code, 18 U. S. C. 550, (*infra*, p. 29) he was constructively present when the illegal sales were made.[13]

Furthermore, in the case of a felony, as this Court said in the *Carroll* case, *supra*, "The usual rule is that a police officer may arrest without warrant one believed by the officer upon reason-

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and, hence, under Section 335 of the Criminal Code, 18 U. S. C. 541 (*infra*, pp. 29–30) is a misdemeanor.

[13] One may be guilty as an aider or abettor although he was not present when the crime was actually committed. *Borgia* v. *United States*, 78 F. 2d 550, 555 (C. C. A. 9), certiorari denied, 296 U. S. 615; *Johnson* v. *United States*, 62 F. 2d 32, 34–35 (C. C. A. 9); *Parisi* v. *United States*, 279 Fed. 253, 255 (C. C. A. 2). It is the generally accepted rule that a misdemeanor is committed in the presence of the arresting officer, when he can detect the commission thereof by the exercise of his own senses, and that mere suspicion is not enough. *Peru* v. *United States*, 4 F. 2d 881, 882–884 (C. C. A. 8); *Garske* v. *United States*, 1 F. 2d 620 (C. C. A. 8); *Snyder* v. *United States*, 285 Fed. 1 (C. C. A. 4); *United States* v. *Rembert*, 284 Fed. 996, 1001 (S. D. Tex.).

Whether the search may be sustained on the basis of the attendant's arrest is open to question, since it does not appear that the ration coupons located in petitioner's locked private office were within the attendant's immediate control. Cf. *Marron* v. *United States*, 275 U. S. 192, 199.

able cause to have been guilty of a felony" (267 U. S. at 156); see also *United States* v. *Lindenfeld*, 142 F. 2d 829, 831 (C. C. A. 2), certiorari denied, 323 U. S. 761; *Shettel* v. *United States*, 113 F. 2d 34, 35 (App. D. C.); *United States* v. *Park Avenue Pharmacy*, 56 F. 2d 753, 756 (C. C. A. 2); *Gerk* v. *United States*, 33 F. 2d 485, 486 (C. C. A. 8); *Brady* v. *United States*, 300 Fed. 540, 543 (C. C. A. 6), certiorari denied, 266 U. S. 620; *Pritchett* v. *Sullivan*, 182 Fed. 480, 482 (C. C. A. 8). The standard by which probable cause is determined is whether the facts are such as to justify a man of prudence in believing that a felony had been committed; if on his own knowledge of the facts or on facts communicated to him by others, he has reasonable ground to believe that the accused has been guilty of a felony, the arrest is lawful. *Maghan* v. *Jerome*, 88 F. 2d 1001, 1002 (App. D. C.); cf. *Stacy* v. *Emery*, 97 U. S. 642, 645.[11]

We submit that petitioner's arrest was lawful because the arresting police officer had probable

[11] In *Stacy* v. *Emery*, this Court said in respect of "reasonable cause" authorizing a seizure for violation of the internal revenue laws: "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient." In the *Maghan* case, the court adopted the rule announced in *Commonwealth* v. *Carey*, 12 Cush. (Mass.) 246, 251. And this Court in the *Carroll* case, *supra*, quoted the rule in determining the nature of probable cause to justify the seizure there involved.

cause for believing that petitioner was a party to a conspiracy to commit an offense against the United States in violation of Section 37 of the Criminal Code, 18 U. S. C. 88 (*infra*, p. 29), which, being punishable by imprisonment for not more than two years, was a felony.[15] Reasonable ground for belief rather than actuality is, of course, the test. Just before the arrest was made, the O. P. A. investigators had bought from petitioner's employee gasoline without being required to give up ration coupons, and they had paid more than the ceiling price for the gasoline (*supra*, pp. 4–5). The arresting officer had knowledge of these facts, and he also heard the employee admit that she made the sales fully cognizant of their illegality and that in so doing she was following petitioner's instructions (R. 15–16, 22–25, 28, 55, 64). It was, we think, plainly evident, as the court below stated (R. 163), that it was "part of [petitioner's] ordinary practice to sell to any casual stranger who did not have coupons, provided he would pay a higher price." (Cf. footnote 5, *supra*, p. 5.) Furthermore, since this unlawful activity was conducted through the joint partici-

[15] Petitioner was arrested both by the New York police officer and one of the O. P. A. investigators (R. 39, 51–52, 56, 64–65, 71–72). The court below has held that a New York peace officer is authorized to arrest for federal crimes. *Marsh* v. *United States*, 29 F. 2d 172, 173–174, certiorari denied, 279 U. S. 849; see also *United States* v. *One Packard Truck*, 55 F. 2d 882, 884. O. P. A. investigators, as such, have no authority conferred by federal statute to make arrests.

pation of petitioner and his employee, there was, in our judgment, an adequate basis for the arresting officer to believe that petitioner was a party to a felonious combination to sell gasoline without calling for ration coupons and at more than the legal price. Cf. *Marron* v. *United States*, 275 U. S. 192, 198.[16]

B. *The officers were authorized on the basis of petitioner's arrest to search his office in order to find and seize the ration coupons.*—The search of premises without a search warrant as an incident to an arrest has been considered in several cases in this Court. In *Agnello* v. *United States*, 269 U. S. 20, 30, the Court said: "The right without a search warrant contemporaneously * * * to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed * * * is not to be doubted. See *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392." And in *Marron* v. *United States*, 275 U. S. 192, 199, it was said of the same subject that the

[16] The fact that the parties to the combination were master and servant did not, of course, preclude a conspiracy. As this Court said in *Hyde* v. *United States*, 225 U. S. 347, 368: "But the fact that a salary was paid by one to another would not preclude a conspiracy between them. It might, indeed, mark a more humble criminal desire, and one which preferred a certain reward rather than take chances in the success of a criminal enterprise, and it was certainly not inconsistent with a full and active participation in the scheme."

search may extend to "all parts of the premises used for the unlawful purpose" "in order to find and seize the things used to carry on the criminal enterprise." In two subsequent cases, however, the Court condemned as unreasonable "a general exploratory search in the hope that evidence of crime might be found." *Go-Bart Importing Co. v. United States,* 282 U. S. 344, 358; *United States v. Lefkowitz,* 285 U. S. 452, 467. In the light of these decisions, we submit that the officers properly searched petitioner's office in order to find and seize the ration coupons.[17]

The court below said, and, we submit, correctly: "The search was in no sense exploratory; the officers did not enter to see what they might find, or at least so far as they may have done so they got nothing. They knew that [petitioner] must have contraband gasoline coupons in his possession; and although of course it was not certain that they were in the office, there was no other cache for them, which was anything like so probable. The coupons were not evidences of crime in the sense of being records of its commission: they were the direct 'means of committing' it, * * *" (R. 163). The officers had just witnessed acts which reasonably led them to the

[17] Actually, petitioner opened the door of his office and gave the coupons to the officers. If, however, his acts did not constitute a waiver, it would appear that the case must be judged as though the officers searched the office and seized the coupons.

belief that petitioner was engaging in a felonious conspiracy to sell gasoline to consumers without taking ration coupons from them. But in order to have gasoline to sell, he needed ration coupons, since under the provisions of section 1394.8207 of Ration Order No. 5C (*infra*, pp. 32–33), a dealer could not obtain gasoline unless he surrendered an equivalent quantity of ration coupons. In this sense ration coupons were vital to the enterprise, and it could not be carried on unless petitioner had no intention of securing additional supplies of gasoline or was obtaining gasoline illegally, as to which no claim is made. Certainly, ration coupons were at least as necessary to the conduct of the unlawful project as the bills in the *Marron* case, as to which it was said in that case, "they were so closely related to the business, it is not unreasonable to consider them as used to carry it on" (275 U. S. at p. 199).

The officers were not engaged in any general exploratory search for whatever evidence of crime they might find, but in a search to find the means of committing a crime which they had only a short time ago observed. It is true that after petitioner's arrest and before petitioner opened the door to his office, the officers conducted an investigation in order to ascertain how much gasoline had been taken from the tanks and whether the ration coupons in the boxes attached to the gasoline pumps corresponded to the gasoline

taken (see supra, p. 6). As we have heretofore indicated (*supra,* p. 23), the officers could reasonably deduce from the sales made to them and the admissions of petitioner's employee that petitioner's general practice was to sell gasoline to consumers without requiring the surrender of ration coupons, and (*supra,* p. 26) that in order to carry on this enterprise, petitioner in all likelihood had ration coupons obtained from non-consumer sources. Accordingly, the exploration did not furnish the basis for the officers' belief that petitioner was in possession of non-consumer coupons. It merely fortified that belief.

Finally, we submit that the search properly extended to petitioner's office. While the court below so held (R. 163–164), it did so on an interpretation of the record less favorable than required. The court thought, as we read the opinion, that the "filling station" where the arrest occurred, was unenclosed, and that the office which was searched was "a building which was a necessary part of the filling station" (R. 163). But, in fact, the "filling station" was not unenclosed, and the office was not "a building." Both were contained in a building in which petitioner conducted his several automobile enterprises (*supra,* pp. 3–4). A portion of the building was devoted to the sale of gasoline, and, presumably, the office was used in connection with all of petitioner's activities. There can hardly be any

question that when an arrest is made in a building of the nature here involved, the office contained therein may be searched, provided it is employed to carry on the unlawful enterprise concerned. Certainly, petitioner's gasoline selling department required the use of an office, and, accordingly, the office was in the area which might be searched.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
JOHN J. COONEY,
Attorneys.

FEBRUARY 1946.

APPENDIX

The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code, 18 U. S. C. 550, provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

Section 335 of the Criminal Code, 18 U. S. C. 541, provides:

> All offenses which may be punished by death or imprisonment for a term exceed-

ing one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors. * * *

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

(2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

(3) The President shall be entitled to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, any person * * *, and make such investigations, as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this subsection (a).

* * * * *

(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be

fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

Ration Order No. 5C issued by the Office of Price Administration as it read on June 20, 1944 (7 F. R. 9135 ff.), provided in pertinent part as follows:

Section 1394.8104. *Coupon-books property of Office of Price Administration; Summary revocations.*—(a) All coupon books, bulk coupons, inventory coupons, other evidences, folders, mileage rationing records and tire inspection records are, and when issued shall remain, the property of the Office of Price Administration. The Office of Price Administration may refuse to issue, and may suspend, cancel, revoke, or recall any ration and may require the surrender and return of any coupon book, bulk coupon, inventory coupons, other evidences, folders, mileage rationing records, and tire inspection records during suspension or pursuant to revocation or cancellation, whenever it deems it to be in the public interest to do so.

Section 1394.8152. *Transfers to consumers.*—On and after November 22, 1942, and notwithstanding the terms of any contract, agreement, or commitment, regardless of when made, a dealer or distributor may transfer gasoline to a consumer, and a consumer may accept such transfer of gasoline, only in exchange for valid coupons, except as provided in §§ 1394.8153, 1394.8154, 1394.8155, and 1394.8156.

Section 1394.8153. *Transfers to consumers in exchange for coupons and ration checks and gasoline purchase permits*—(a) *Coupons issued for registered and commer-*

cial motor vehicles.—Transfers may be made and accepted under the following conditions in exchange for Class A, B, C, D, or T coupons having an aggregate unit value equal to the amount of gasoline transferred. However, if the transferee is able to accept only a portion of the amount of gasoline represented by the unit value of the coupon, the transferor shall nevertheless require the surrender of an entire coupon.

(1) In the case of a coupon issued in a ration book, the transferor at the time of transfer, must require presentation of the coupon book and must detach therefrom coupons having an aggregate unit value equal to the amount of gasoline transferred. * * *

Section 1394.8177. *Rations not transferable.*

* * * * * *

(c) No person shall have in his possession any gasoline deposit certificate, folder or coupon book, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as a part of a ration book) or other evidence, or any identifying folder except the person, or the agent of the person, to whom such book, coupon, certificate or folder was issued or by whom it was acquired in accordance with the provisions of Ration Order No. 5C.

Section 1394.8207. *Restriction on transfers to dealers*—(a) *Restriction on transfers.*—(1) Except as provided in subparagraph (4) of this paragraph and in § 1394.8209, no dealer or distributor shall transfer or offer to transfer gasoline to a dealer and no dealer shall receive a transfer of gasoline, except in exchange for a quan-

tity of coupons or other evidences, at the time of the actual delivery of the gasoline or in advance thereof, equal in gallonage value to the quantity of the gasoline transferred, or, in cases in which gasoline is regularly transferred to him on a temperature adjustment basis, equal in gallonage value to the adjusted quantity of gasoline so transferred: * * *.

Section 1394.8217. *Accountability and records of dealers and intermediate distributors.*—(a) Every dealer and intermediate distributor shall be accountable for all gasoline ration credits, gasoline deposit certificates, coupons and other evidences received by him. Gasoline deposit certificates, coupons and other evidences received at or for a place of business shall be, at all times when the dealer or distributor is open to transact business, retained by him at the place of business for which they were received, or deposited in a ration bank account maintained for that place of business, until such time as they are surrendered to a dealer or distributor in exchange for gasoline, or otherwise surrendered pursuant to Ration Order No. 5C. The aggregate gallonage value of gasoline deposit certificates, coupons and other evidences on hand or on deposit for each place of business of a dealer or intermediate distributor, shall, at all times, be equal to, but not in excess of, the number of gallons of gasoline which would be required to fill the storage capacity of such place of business, as shown by the current certificate of registration, * * *

Section 1394.8235. *Inspection of records, facilities, coupon books and other evidences.*— * * * (b) All tire inspection

records and gasoline deposit certificates and all coupon books, coupons, and other evidences are, and when issued shall remain, the property of the Office of Price Administration. Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law enforcement officer of the United States or of any state, county, or local government, every person shall produce for inspection any tire inspection record and gasoline deposit certificate and any gasoline coupon books, coupons, and other evidences in his possession or control, whether valid, invalid, void or expired in accordance with Ration Order No. 5C. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States, or of any state, county or local government are authorized to make such inquiries of any person as may be pertinent to determine whether a violation of Ration Order No. 5C has been or is being committed, and are authorized to receive the surrender of all gasoline deposit certificates, gasoline coupon books, coupons and other evidences acquired by any person otherwise than in accordance with Ration Order No. 5C, whether valid, invalid, void or expired.

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SUPREME COURT OF THE UNITED STATES.

No. 404.—October Term, 1945.

Jack Davis, Petitioner,
vs.
The United States of America.
On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 10, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was convicted under an information charging him with unlawfully having in his possession on June 20, 1944, 168 gasoline ration coupons, representing 504 gallons of gasoline.[1]

[1] The information charged a violation of § 2(a) of the Act of June 28, 1940, 54 Stat. 676, as amended by the Act of May 31, 1941, 55 Stat. 236 and by Title III, § 301 of the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. App., Supp. IV § 633. Sec. 2(a) provides in part

"(2) . . . Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

"(3) The President shall be entitled to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, any person . . . , and make such investigations, as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this subsection (a).

. . . . . .

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

The Office of Price Administration, to which that power had been delegated, issued ration orders for gasoline. Ration Order No. 5C, as it read on June 20, 1944 (8 Fed. Reg. 16423), provided in part as follows:

"Sec. 1394.8177(c). No person shall have in his possession any gasoline deposit certificate, folder, or any coupon book, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as a part of a ration book) or other evidence, or any identifying folder, except the person, or the agent of the person, to whom such book, coupon, certificate or folder was issued or by whom it was acquired in accordance with the provisions of Ration Book (*sic*) No. 5C."

The judgment of conviction was sustained by the Circuit Court of Appeals (151 F. 2d 140) over the objection that there was an unlawful search which resulted in the seizure of the coupons and their use at the trial in violation of the rule of *Weeks* v. *United States*, 232 U. S. 383, *United States* v. *Lefkowitz*, 285 U. S. 452, and related cases. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

Davis was president of a corporation by the name of Davis Auto Laundry Corporation which maintained a gasoline filling station in New York City. He was suspected of running a black market in gasoline. Several agents drove to a place near the gasoline station and observed it for a few hours. They had no search warrant nor a warrant for the arrest of petitioner. Two of the agents drove their cars into the station and asked for gas. Petitioner was not present at the time. But an attendant, an employee of petitioner, was present and waited on them. Through her each of the two agents succeeded in purchasing gas without gasoline ration stamps by paying twenty cents a gallon above the ceiling price. Shortly thereafter they arrested her for selling gasoline without coupons and above the ceiling price. She said that in doing so she was following petitioner's instructions. While she was being questioned by the agents, petitioner returned to the station in his car. They immediately arrested him on the same charge as the attendant[2] and searched his car. They demanded

"Sec. 1394.8217(a). Every dealer and intermediate distributor shall be accountable for all gasoline, ration credits, gasoline deposit certificates, coupons and other evidences received by him. Gasoline deposit certificates, coupons and other evidences received at or for a place of business shall be, at all times when the dealer or distributor is open to transact business, retained by him at the place of business for which they were received, or deposited in a ration bank account maintained for that place of business, until such time as they are surrendered to a dealer or distributor in exchange for gasoline, or otherwise surrendered pursuant to Ration Order No. 5C. The aggregate gallonage value of gasoline deposit certificates, coupons and other evidences on hand or on deposit for each place of business of a dealer or intermediate distributor, shall, at all times, be equal to, but not in excess of, the number of gallons of gasoline which would be required to fill the storage capacity of such place of business, as shown by the current certificate of registration, ... " 8 Fed. Reg. 15981.

[2] Selling gasoline without receipt of ration coupons, selling gasoline in excess of the ceiling price, or unlawfully possessing ration coupons is a misdemeanor. See § 2(a), *supra*, note 1. A felony is an offense punished by death or imprisonment for a term exceeding one year. Criminal Code § 335, 18 U. S. C. § 541.

and received from him the keys to tin boxes attached to the gasoline pumps and in which gasoline ration coupons were kept. One of them began to examine and measure the gasoline storage tanks and their contents. It soon appeared that the gasoline ration coupons found in the tin boxes were not sufficient to cover the amount by which the capacity of the storage tanks had been diminished by sales.

While this examination of the storage tanks was under way, petitioner went with two of the agents into his office which was on the premises.[3] The office consisted of a waiting room and inner room. He was questioned in the waiting room for about an hour. A door led from the waiting room into the inner room where records were kept. The door to it was locked. Petitioner at first refused to open it. When told that the examination of the tanks had revealed a shortage of coupons, petitioner assured the agents that he had sufficient coupons to cover the shortage and that they were in the locked room. The officers asked to see the coupons and based their demand on the fact that the coupons were property of the government of which petitioner was only the custodian. Petitioner persisted, however, in his refusal to unlock the door. Before long he did unlock it, took from a filing cabinet the coupons on which the conviction rests, and gave them to the agents. He testified that he did so because the agents threatened to break down the door if he did not. The District Court did not believe petitioner's version of the episode. One agent testified: "Q. Did you try to convince Davis that he ought to open that door leading into the private office? A. I didn't try to convince him. I told him that he would have to open that door. Q. Did you tell him if he did not you would break it down? A. I did not tell him that at all." And it appeared that while the two agents were talking with Davis in the waiting room, another agent was in the rear shining a flashlight through an outside window of the inner room and apparently trying to raise the window. According to one of the agents, when petitioner saw that, he said, "He don't need to do that. I will open the damned door." Some six weeks later petitioner was arrested on a warrant and arraigned.

[3] The filling station was located in a building about 250 feet long. One set of pumps was near the entrance to one street; the other set was at the opposite end near the entrance to another street. The office was located about half-way between the two sets of pumps.

The District Court found that petitioner had consented to the search and seizure and that his consent was voluntary. The Circuit Court of Appeals did not disturb that finding, although it expressed some doubt concerning it. In its view, the seized coupons were properly introduced into evidence because the search and seizure, being incidental to the arrest, were "reasonable" regardless of petitioner's consent.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

And the Fifth Amendment provides in part that "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

The law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of these two constitutional provisions. *Boyd* v. *United States*, 116 U. S. 616. It reflects a dual purpose—protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him. *Boyd* v. *United States*, *supra*; *Weeks* v. *United States*, *supra*. And see *Oklahoma Press Pub. Co.* v. *Walling*, decided Feb. 11, 1946.

We do not stop to review all of our decisions which define the scope of "reasonable" searches and seizures. For they have largely developed out of cases involving the search and seizure of *private* papers. We are dealing here not with *private* papers or documents, but with gasoline ration coupons which never became the private property of the holder but remained at all times the property of the government and subject to inspection and recall by it.

At the times relevant here, gasoline was rationed. Dealers could lawfully sell it only on receipt of ration coupons.[4] They in turn could receive their supplies of gasoline from the distributors only on delivery of coupons.[5] It was required that a dealer at all times have coupons on hand at his place of business or in a bank equal to but not in excess of the gallonage necessary to

[4] See Ration Order No. 5C, *supra*, note 1, §§ 1394.8152, 1394.8153.
[5] *Id.*, § 1394.8207.

fill his storage tanks.[6] Possession of coupons obtained in contravention of the regulations was unlawful.[7] The coupons remained the property of the Office of Price Administration[8] and were at all times subject to recall by it.[9] And they were subject to inspection at all times.[10]

We are thus dealing not with *private* papers or documents but with *public* property in the custody of a citizen. The distinction between the two classes of property in the law of searches and seizures was recognized in *Wilson* v. *United States*, 221 U. S. 361, 380, where the Court stated:

> "But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the *Boyd*

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[6] *Id.*, § 1394.8217(a), *supra*.

[7] *Id.*, § 1394.8177(c), *supra*, note 1.

[8] *Id.*, § 1394.8227(b) provided that all "gasoline deposit certificates and all coupon books, coupons, and other evidences are, and when issued shall remain, the property of the Office of Price Administration."

[9] *Id.*, § 1394.8104(a):

> "All coupon books, bulk coupons, inventory coupons, and other evidences, are, and when issued shall remain, the property of the Office of Price Administration. The Office of Price Administration may refuse to issue, and may suspend, cancel, revoke, or recall any ration and may require the surrender and return of any coupon book, bulk coupon, inventory coupons or other evidences during suspension or pursuant to revocation or cancellation, whenever it deems it to be in the public interest to do so."

[10] *Id.*, § 1394.8235(b) provided in part:

> "Upon demand made by any investigator of the Office of Price Administration or by any police officer, constable, or other law enforcement officer of the United States or of any state, county, or local government, every person shall produce for inspection any tire inspection record and gasoline deposit certificate and any gasoline coupon books, coupons, and other evidences in his possession or control; whether valid, invalid, void or expired in accordance with Ration Order No. 5C. Investigators of the Office of Price Administration and all police officers, constables and other law enforcement officers of the United States, or of any state, county or local government are authorized to make such inquiries of any person as may be pertinent to determine whether a violation of Ration Order No. 5C has been or is being committed, and are authorized to receive the surrender of all gasoline deposit certificates, gasoline coupon books, coupons and other evidences acquired by any person otherwise than in accordance with Ration Order No. 5C, whether valid, invalid, void or expired."

As to the power of inspection given by the Act of June 28, 1940, see § 2(a)(3), *supra*, note 1.

Case where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. If he has embezzled the public moneys and falsified the public accounts he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-crimination. The principle applies not only to public documents in public offices but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."

The Court proceeded to analyze the English and American authorities and added, pp. 381-382:

"The fundamental ground of decision in this class of cases is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection."

The distinction is between property to which the government is entitled to possession and property to which it is not.[11] See Wigmore on Evidence (3d ed.) §2259c. The distinction has had important repercussions in the law, beyond that indicated by *Wilson* v. *United States*, *supra*. For an owner of property who seeks to take it from one who is unlawfully in possession has long been recognized to have greater leeway than he would have but for his right to possession. The claim of ownership will even justify a trespass and warrant steps otherwise unlawful. *Richardson* v. *Anthony*, 12 Vt. 273; *Madden* v. *Brown*, 3 App. Div. 454; *State* v. *Dooley*, 121 Mo. 591.

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[11] This distinction was noted in another connection in Boyd v. United States, *supra*, pp. 623-624, where the Court said:

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto*

We do not suggest that officers seeking to reclaim government prperty may proceed lawlessly and subject to no restraints. Nor do we suggest that the right to inspect under the regulations subjects a dealer to a general search of his papers for the purpose of learning whether he has any coupons subject to inspection and seizure. The nature of the coupons is important here merely as indicating that the officers did not exceed the permissible limits of persuasion in obtaining them.

They appeared on the premises during business hours. They had ocular evidence that a misdemeanor had been committed, a crime to which petitioner was an aider or abetter,[12] since, according to the attendant, she made the illegal sales pursuant to petitioner's instructions. Since sales were being made without receipt of coupons from customers, it was fair to assume (unless, as was at no time suggested, the business was being liquidated) that petitioner somewhere had a supply of coupons adequate to replenish his storage tanks. The inspection which was made was an inspection of the tanks attached to the pumps. And the search was of the office adjacent to the pumps—the place where petitioner transacted his business. Moreover, the officers demanded

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coelo. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, &c., are not within this category. *Commonwealth* v. *Dana*, 2 Met. (Mass.) 329."

And see Tennessee v. Hall, 164 Tenn. 548; State v. Knight, 34 N. M. 217; State v. Bennett, 315 Mo. 1267.

[12] Criminal Code § 332, 18 U. S. C. § 550, provides:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

the coupons on the basis that they were property of the government and that petitioner was merely the custodian of them. And there was no general, exploratory search. Only the contraband coupons were demanded; only coupons were taken.

These facts distinguished this case from such cases as *Amos v. United States*, 255 U. S. 313, where officers without a search warrant swoop down on a private residence, obtain admission through the exertion of official pressure, and seize private property. The filling station was a place of business, not a private residence. The officers' claim to the property was one of right. For the coupons which they demanded to see were government property. And the demand was made during business hours. Whatever may be the limits of inspection under the regulations, law enforcement is not so impotent as to require officers, who have the right to inspect a place of business, to stand mute when such clear evidence of criminal activity is known to them.

Where the officers seek to inspect *public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought. The demand is one of right. When the custodian is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved. The custodian in this situation is not protected against the production of incriminating documents. *Wilson* v. *United States, supra.* The strict test of consent, designed to protect an accused against production of incriminating evidence, has no place here. The right of privacy, of course, remains. But, as we have said, the filling station was a place of business, not a private residence. The right to inspect existed. And where one is seeking to reclaim his property which is unlawfully in the possession of another, the normal restraints against intrusion on one's privacy, as we have seen, are relaxed. The District Court found, after hearing the witnesses, that petitioner consented—that although he at first refused to turn the coupons over, he soon was persuaded to do so and that force or threat of force was not employed to persuade him. According to the District Court, the officers "persuaded him that it would be a better thing for him to permit them to examine" the coupons; "they talked him into it." We cannot say as a matter of law that that finding was erroneous. The public char-

acter of the property, the fact that the demand was made during business hours at the place of business where the coupons were required to be kept, the existence of the right to inspect, the nature of the request, the fact that the initial refusal to turn the coupons over was soon followed by acquiescence in the demand—these circumstances all support the conclusion of the District Court. We accordingly affirm the judgment below without reaching the question whether but for that consent the search and seizure incidental to the arrest were reasonable.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 404.—October Term, 1945.

Jack Davis, Petitioner,
vs.
United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 10, 1946.]

Mr. Justice Frankfurter, with whom Mr. Justice Murphy concurs, dissenting.

In its surface aspects this case concerns merely a squalid effort to evade the wartime system of gasoline rationing. But it should not be disposed of in that perspective. It is not the first petty little case to put to the test respect for principles which the founders of this nation deemed essential for a free society. For the case is directly related to one of the great chapters in the historic process whereby civil liberty was achieved and constitutionally protected against future inroads.

The Court's decision, as I see it, presents this issue: May papers which an accused could not be compelled to produce even by a judicial process of a search warrant be taken from him against his will by officers of the law without such judicial process for use as evidence in a criminal prosecution against him? Judicial process may not compel the production of documents either because of the protection of the Fifth Amendment against self-crimination, or, as in this case, because the authorization by Congress of search warrants is withheld in a situation like the present.[1] The Court apparently rules that because the gasoline business was subject to regulation, the search and seizure of such documents without a warrant is not an unreasonable search and

[1] The petitioner was arrested for the sale of gasoline without coupons and at a price greater than that authorized by the Office of Price Administration ceilings; he was prosecuted for the illegal possession of gasoline ration documents. These offenses are misdemeanors. 56 Stat. 176, 179, 50 U. S. C. App. § 633(5).

The Espionage Act limits the issuance of search warrants to those in which the property sought was stolen or embezzled, used as a means of committing a felony, or used to aid illegally a foreign nation. 40 Stat. 217, 228, 18 U. S. C. § 612. The documents involved in this case do not come within any of these categories.

seizure condemned by the Fourth Amendment. To hold that the search in this case was legal is to hold that a search which could not be justified under a search warrant is lawful without it. I cannot escape the conviction that such a view of the Fourth Amendment makes a travesty of it and of the long course of legislation in which Congress applied that Amendment.

Where search is made under the authority of a warrant issued from a judicial source, the scope of the search must be confined to the specific authorization of the warrant. It cannot be that the Constitution meant to make it legally advantageous not to have a warrant, so that the police may roam freely and have the courts retrospectively hold that the search that was made was "reasonable," reasonableness being judged from the point of view of obtaining relevant evidence. I had supposed that that was precisely what the Fourth Amendment was meant to stop. "The Government could desire its possession only to use it as evidence against the defendant and to search and seize it for such purpose was unlawful." *Gouled* v. *United States*, 255 U. S. 298, 310.

There is indeed a difference between private papers and papers having also a public bearing. Private papers of an accused cannot be seized even through legal process because their use would violate the prohibition of the Fifth Amendment against self-crimination. So-called public papers—papers in which the public has an interest other than that which they may serve as evidence in a case—may be seized, but like all other things in an individual's possession they can be seized only upon a properly safeguarded search. The amenability of corporate papers to testimonial compulsion means that a corporation, because it is a corporation, cannot make claim to the privilege of self-crimination. Nor can the custodian of corporate books immunize them against their production in court because they may also carry testimony against him. The Fourth Amendment does not give freedom from testimonial compulsion. Subject to familiar qualifications every man is under obligation to give testimony. But that obligation can be exacted only under judicial sanctions which are deemed precious to Anglo-American civilization. Merely because there may be the duty to make documents available for litigation does not mean that police officers may forcibly or fraudulently obtain them. This protection of the right to be let alone except under responsible

judicial compulsion is precisely what the Fourth Amendment meant to express and to safeguard.

An even more fundamental issue lurks in the Court's opinion if a casual but explicit phrase about the locus of the search and seizure as "a place of business, not a private residence" is intended to carry relevant legal implications. If this is an indirect way of saying that the Fourth Amendment only secures homes against unreasonable searches and seizures but not offices—private offices of physicians and lawyers, of trade unions and other organizations, of business and scientific enterprises—then indeed it would constitute a sudden and drastic break with the whole history of the Fourth Amendment and its applications by this Court. See *Olmstead* v. *United States,* 277 U. S. 438, 477, and cases cited in footnotes 5, 6, and 7. I cannot believe that a vast area of civil liberties was thus meant to be wiped out by a few words, without prior argument or consideration.

The course of decision in this Court has thus far jealously enforced the principle of a free society secured by the prohibition of unreasonable searches and seizures. Its safeguards are not to be worn away by a process of devitalizing interpretation. The approval given today to what was done by arresting officers in this case indicates that we are in danger of forgetting that the Bill of Rights reflects experience with police excesses. It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.

The issue in this case is part of a long historic process and proper consideration of the problem before us compels rather extended discussion. These are the circumstances that give rise to our problem. For some time operations of the gasoline station owned by Davis under a corporate form had been suspect by the Office of Price Administration. On the day of the questioned seizure, three O.P.A. investigators and two New York City detectives kept watch on the station for several hours. One of the O.P.A. men drove his car to the pumps for gas. After the attendant had filled his tank, he told her, when asked for coupons, that he had none. She then demanded a higher price for the gaso-

line which he paid with a marked five dollar bill. Later, another investigator repeated this performance. Then all five officers went into the station, notified the attendant that she was under arrest, and requested and obtained from her the two marked bills and a card on which she had recorded the sales. While the girl's questioning was still proceeding, Davis drove into the station. His car was immediately searched and he was charged with selling gas over ceiling prices and without coupons. These were charges of misdemeanors. The officers then demanded and received from Davis keys for the locked boxes on the pumps intended for the deposit of coupons received for gas sold. While some of the officers were engaged in checking the discrepancy between the amount of gas in storage tanks and the coupons in the boxes, Davis was taken by two of the agents to an outer room in his office. They demanded from him gas coupons which he claimed to have in sufficient numbers to make up the deficiencies in the locked boxes. He stubbornly refused despite the insistence of one of the officers that "he would have to open that door" to his private office. Finally, when another officer flashed a light into the office from an outside window and evinced an intention to force the window, Davis unlocked the door. Thereupon he took some envelopes from a filing cabinet and handed them to the agents. These envelopes contained the stamps which formed the basis of the prosecution. He was then taken to O.P.A. headquarters and questioned, but eventually allowed to go. Several weeks later he was taken into custody and then charged with the illegal possession of gasoline ration documents. This charge also is a misdemeanor.

The petitioner made timely motions for the suppression of the evidence, see *Nardone* v. *United States*, 308 U. S. 338, 341-42, claiming that they were illegally seized and barred as evidence against him. The trial court denied these motions on the ground that Davis had voluntarily turned the stamps over to the officers. The Circuit Court of Appeals sustained the conviction but it did not accept the District Court's view that Davis had surrendered the stamps of his own free will. What the Circuit Court of Appeals thought about the matter is best expressed in its own language: "The judge found that Davis' consent was 'voluntarily' given, and for that reason denied the motion to suppress the evidence. We need not decide that that finding is wrong, for we can dispose of the case upon other grounds; but we must

own to some doubt whether a consent obtained under such circumstances should properly be regarded as 'voluntary.' Davis must have known, under arrest as he was, that the officers were not likely to stand very long upon ceremony, but in one way or another, would enter the office." 151 F. 2d 140, 142. One must reject the District Court's finding that Davis' consent went with his surrender of the documents unless one is to hold that every submission to the imminent exertion of superior force is consensual if force is not physically applied. The district court's finding that Davis voluntarily surrendered the documents is not one of those findings of facts which appropriately calls for our acceptance. When such a finding involves conflicting evidence or the credibility of a witness, the advantage of having seen or heard a witness may be decisive. But here the issue is not as to what took place but as to the significance of what took place. And when a district court's finding of a so-called fact is as interwoven as it is here with constitutional consequences, we cannot accept a finding whereby the constitutional issue is predetermined. We are not bound by findings that operate as cryptic constitutional determinations even when they come here, unlike the present case, supported by both lower courts. See *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 404. To say that a yielding to continuous pressure by arresting officers, accompanied by minatory manifestations to resort to self-help, constitutes a voluntary yielding, is to disregard ordinary experience. This Court preferred not to do that in *Amos* v. *United States*, 255 U. S. 313. We there held that where officers stated that they were revenue officers and requested admission to the premises in order to make a search there was, as a matter of law, "implied coercion." Inasmuch "as conduct under duress involves a choice," the Fourth Amendment is hardly to be nullified by finding every submission short of overpowering force "voluntary." See *Union Pac. R. R.* v. *Pub. Serv. Comm.*, 248 U. S. 67, 70.

This Court also attributes voluntariness to Davis' surrender of the document. But it does so not because it finds that what Davis did was an exercise of free choice. It does not question the doubt of the Circuit Court of Appeals whether the consent obtained from Davis was, as a psychological fact, a voluntary act. The Court derives voluntariness from the fact that what the officers compelled Davis to give up were ration coupons. But, surely,

this is to assign to ordinary words a private, esoteric meaning. Common usage rejects such meaning of "voluntary" and law has not heretofore indulged it. In considering whether evidence was freely given or coerced, the law has always meant by voluntary what everybody else means by it. To make voluntariness turn on the nature of the quest instead of on the nature of the response of the person in control of the sought documents, is to distort familiar notions on the basis of which the law has heretofore adjudged legal consequences. The Court accepts the Government's argument[2] which the Circuit Court of Appeals rejected, and rejected because gravely disturbed by its implication. Though differently phrased, the argument which has here found favor evoked this comment in the concurring opinion of Judge Frank: "I add a few words only because I think it important to underscore our rejection of the following argument on which the Assistant United States Attorney chiefly relied: Whenever the government validly regulates any business and includes in its regulation a valid requirement that records be kept which shall be open to official inspection, then refusal to produce the records for such inspection authorizes the officers to enter the premises and seize the records. One variant of the argument was that refusal to permit inspection in such circumstances constitutes, in effect, the legal equivalent of consent to enter; another variant was that, in such circumstances conduct of the defendant must be interpreted as consent to entry although, in other circumstances, the very same

[2] A few words only need be said about the cases on which the Government relies. A major portion of them deal with the amenability of documents to production upon legal process. *United States* v. *Wilson*, 221 U. S. 361; *Bowles* v. *Insel*, 148 F. 2d 91; *Cudmore* v. *Bowles*, 145 F. 2d 697; *Rodgers* v. *United States*, 138 F. 2d 992; *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384. In the others, consent was given to inspect the papers in accordance with the provisions of the governing statute. *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774; *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566; In re *Sana Laboratories*, 115 F. 2d 717 (subsequent to the inspection there was a wrongful taking; the court admitted the evidence procured as a result of the inspection, but barred the documents from evidence); *C. M. Spring Drug Co.* v. *United States*, 12 F. 2d 852; *United States* v. *Kemper*, 59 F. Supp. 905; *Bowles* v. *Stitzinger*, 59 F. Supp. 94; *Bowles* v. *Curtiss Candy Co.*, 55 F. Supp. 527; *United States* v. *Sherry*, 294 Fed. 684 (here the documents were taken with the consent of the custodian). In *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786, however, the situation bears some resemblance to the present case. There the Circuit Court of Appeals attributed the consent of the custodian, following continual refusal, to the command of the statute. While there was no indication, as evidenced by the opinion, that the documents were secured through fear of force, the inspection afforded was probably not voluntary. Insofar as there is support in that case for a search that transgressed the Fourth Amendment, the observations are mere dicta, since no timely objection was filed.

conduct would be regarded as refusal. In one way or another, the Assistant United States Attorney urged that obstruction of the right of officers to inspect deprived the defendant of his usual privilege to be free of unreasonable search and seizure." 151 F. 2d at 144.

Of course there is an important difference in the constitutional protection afforded their possessors between papers exclusively private and documents having public aspects. *Cf. Weeks* v. *United States*, 232 U. S. 383, 393-94; *Gouled* v. *United States*, 255 U. S. 298, 308-309. But the essence of the difference is that under appropriate circumstances wholly private papers are not even subject to testimonial compulsion whereas other papers, once they have been legally obtained, are available as evidence. Had the coupons in controversy been secured by a proper search they could be used against the defendant at the trial. But their character does not eliminate the restrictions of the Fourth Amendment and subject the person in possession of such documents, against his protest, to searches and seizures otherwise unwarranted.

The acceptance of the Government's argument opens an alarming vista of inroads upon the right of privacy. This right the Fourth Amendment sought to protect by its general interdiction of police intrusion without prior judicial authorization through search warrants issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article IV. Only the other day every person not in the armed forces had in his possession O. P. A. documents which technically were the property of the O.P.A., and the same situation may come to pass tomorrow; most businesses in the country are in possession of documents required to be kept under federal and State authority; and there is every prospect that this network of required records will be extended. It misconceives the issues to assume that the protection for privacy here urged would serve as a shield against scrutiny of the records of the giant industries or the great trade unions. The Fourth Amendment does not differentiate between big and small enterprise. But, in any event, while our economy is extensively carried on through the corporate form, the latest available figures show that of the multitudinous income-reporting corporations only about five per cent have a net income above $100,000.

It cannot be that the highly prized Constitutional immunity from police intrusion, as it affects activities that permeate our national life, is now to be curtailed or viewed with laxity.

The Court's opinion has only its own reasoning to support it. Nothing that this Court has ever decided or sanctioned gives it strength. *Wilson* v. *United States*, 221 U. S. 361, invoked by the Court was a very different story. That case was concerned with the difference between the amenability of a corporation to testimonial compulsion and the immunity of an individual, under revelant circumstances, to be free from the duty to give testimony. The core of the Government's claim here is the right to seize documents in the absence of judicial process. The difference between demanding documents without legal process and seizing them on the basis of such process, is the difference between the protection of civil liberties and their invasion. The difference is the essence of the Fourth Amendment.

Indeed, so unhappy was the experience with police search for papers and articles "in home or office," *Gouled* v. *United States*, 255 U. S. 298, 308, 309, that it was [redacted] maintained that no search and seizure is valid. To Lord Coke has been attributed the proposition that warrants could not be secured even for stolen property. But see Coke, *Fourth Institute*, 176-77. Under early English doctrine even search warrants by appropriate authority could issue only for stolen goods. See 2 Hale, *Pleas of the Crown*, 113-14, 149-51; Gabbett, *Criminal Law* (1843) 156 *et seq.*; Chitty, *Criminal Law* (5th ed., 1847) 64 *et seq.*; Barbour, *Criminal Law* (2d ed., 1852) 499 *et seq.*; 1 Archbold, *Criminal Procedure* (7th ed., 1860) 141. Certainly warrants lacking strict particularity as to location to be searched or articles to be seized were deemed obnoxious. *Ibid:* see also 2 Hawkins, *Pleas of the Crown*, 130, 133. An attempt to exceed these narrow limits called forth the enduring judgment of Lord Camden, in *Entick* v. *Carrington*, 19 Howell's State Trials, 1029, in favor of freedom against police intrusions. And when appeal to the colonial courts on behalf of these requisite safeguards for the liberty of the people failed, *Paxton's Case*, Quincy (Mass.) 51, a higher tribunal resolved the issue. The familiar comment of John Adams on Otis' argument in *Paxton's Case* can never become stale: "American independence was then and there born; the seeds of patriots and heroes were then and there sown, to defend the

rigorous youth, the *non sine diis animosis infans*. Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free." 10 Adams, *Works*, 247-248; for a description of Otis' speech in *Paxton's Case*, see 2 *id.* 523. So basic to liberty is the protection against governmental search and seizure, that every State but one has this as a constitutional safeguard. ~~The sole exception is New York where, from earliest days, this privilege of privacy has been safeguarded by a statute to which tradition has accorded the respect of a constitutional sanction.~~

This bleak recital of the past was living experience for Madison and his collaborators. They wrote that experience into the Fourth Amendment, not merely its words. Mention has been made of the doubt in the minds of English and Colonial libertarians whether searches and seizures could be sanctioned even by search warrants. It is significant that Madison deemed it necessary to put into the Fourth Amendment a qualifying permission for search and seizure by the judicial process of the search warrant—a search warrant exacting in its foundation and limited in scope. This qualification gives the key to what the framers had in mind by prohibiting "unreasonable" searches and seizures. The principle was that all seizures without judicial authority were deemed "unreasonable." If the purpose of its framers is to be respected, the meaning of the Fourth Amendment must be distilled from contemporaneous history. The intention of the Amendment was accurately elucidated in an early Massachusetts case. The court there had before it the terms of the Massachusetts Constitution, on which, with like provisions in other State Constitutions, the Fourth Amendment was based:

> "With the fresh recollection of those stirring discussions [respecting writs of assistance], and of the revolution which followed them, the article in the Bill of Rights, respecting searches and seizures was framed and adopted. This article does not prohibit all searches and seizures of a man's person, papers, and possessions; but such only as are 'unreasonable,' and the foundation of which is 'not previously supported by oath or affirmation.' The legislature were not de-

This historic safeguard against unreasonable search and seizure was given formal constitutional sanction in New York in 1938. N.Y. Const. of 1938, Art. 1, § 12.

prived of the power to authorize search warrants for probable causes, supported by oath or affirmation, and for the punishment or suppression of any violation of law. The law, therefore, authorizing search warrants in certain cases, is in no respect inconsistent with the declaration of rights." *Commonwealth* v. *Dana*, 2 Met. (Mass.) 329, 336.

Such was the contemporaneous construction of the Fourth Amendment by the Congress. It gave specific authorization whenever it wished to permit searches and seizures. Beginning with the first Congress down to 1917, Congress authorized search by warrant not as a generally available resource in aid of criminal prosecution but in the most restricted way, observing with a jealous eye the recurrence of evils with which our early statesmen were intimately familiar. For each concrete situation Congress deemed it necessary to pass a separate act. An incomplete examination finds scores of such *ad hoc* enactments scattered through the Statutes at Large. Not until 1917, and then only after repeated demands by the Attorney General, did Congress pass the present statute authorizing the issue of search warrants for generalized situations. 40 Stat. 217, 228, 18 U. S. C. §§ 611 *et seq.* Even then the situations were restricted and the scope of the authority was strictly defined. In the case before us no attempt was made to get a search warrant because none could have been got. Congress did not authorize one either on the charges on which Davis was originally arrested or on which he was ultimately tried. And even since the 1917 Act Congress has emphasized the importance of basing the compulsory demand for evidence upon judicial process rather than the zeal of arresting officers. The habit of continual watchfulness against the dangers of police abuses has been reflected in that Congress has continued to authorize search warrants for particular situations by specific legislation or by reference to the 1917 Act. These revealing enactments are summarized in an Appendix.

In the course of its decisions, with a deviation promptly retraced, this Court has likewise reflected the broad purpose of the Fourth Amendment. The historic reach of the Amendment and the duty to observe it was expounded for the Court by Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, "a case that will be remembered as long as civil liberty lives in the United States." Brandeis, J., in *Olmstead* v. *United States*, 277 U. S.

438, 471, at 474. The Amendment has not been read in a niggardly spirit or with the outlook of a narrow-minded lawyer.

Since the opinion in this case seems to me out of line with our prior decisions it becomes important to recall how this Court has heretofore viewed the Fourth Amendment and what has actually been decided. I shall draw on a summary of the Court's decisions by Mr. Justice Brandeis:

> "Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the *Boyd* case itself. Taking language in its ordinary meaning, there is no 'search' or 'seizure' when a defendant is required to produce a document in the orderly process of a court's procedure. 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' would not be violated, under any ordinary construction of language, by compelling obedience to a subpoena. But this Court holds the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. Literally, there is no 'search' or 'seizure' when a friendly visitor abstracts papers from an office; yet we held in *Gouled* v. *United States*, 255 U. S. 298, that evidence so obtained could not be used. No court which looked at the words of the Amendment rather than at its underlying purpose would hold, as this Court did in *Ex parte Jackson*, 96 U. S. 727, 733, that its protection extended to letters in the mails. The provision against self-incrimination in the Fifth Amendment has been given an equally broad construction. The language is: 'No person . . . shall be compelled in any criminal case to be a witness against himself.' Yet we have held, not only that the protection of the Amendment extends to a witness before a grand jury, although he has not been charged with crime, *Counselman* v. *Hitchcock*, 142 U. S. 547, 562, 586, but that: 'It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.' *McCarthy* v. *Arndstein*, 266 U. S. 34, 40. The narrow language of the Amendment has been consistently construed in the light of its object, 'to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters but it is as broad as the mischief against which it seeks to guard.'" *Counselman* v. *Hitchcock*, *supra*, p. 562.

"Decisions of this Court applying the principle of the *Boyd* case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in an office or elsewhere; whether the taking was effected by force, by fraud, or in the orderly process of a court's procedure. From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it; and that use, in any criminal proceeding, of the contents of the papers so examined—as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere—any such use constitutes a violation of the Fifth Amendment." *Olmstead* v. *United States*, 277 U. S. 438, 471, at 476-478.

And so we are finally brought to the question whether the seizure of documents which could not possibly have been justified as the result of a search under a warrant, since no such warrant could have been authorized by law, can be justified as a search and seizure without a warrant. Such justification must have some historic foundation, otherwise it is clearly out of the bounds of the Fourth Amendment. The court below evidently struggled in reaching its conclusion because of some decisions here which it naturally found "not entirely harmonious." Its chief reliance was language in *Marron* v. *United States*, 275 U. S. 192. A short answer would be that the sting of the *Marron* case was taken by two later case. *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358, and *United States* v. *Lefkowitz*, 285 U. S. 452, 465. But a closer analysis is called for.

One would expect a hard-headed system like the common law to recognize exceptions even to the most comprehensive principle for safeguarding liberty. This is true of the prohibition of all searches and seizures as unreasonable unless authorized by a judicial warrant appropriately supported. Such is the exception, historically well recognized, of the right to seize without warrant goods and papers on ships or other moving vehicles. Another exception is the right of searching the person upon arrest. Whether that right is a surviving incident of the historic role of the "hue and cry" in early Anglo-Saxon law, see *People* v. *Chiagles*, 237 N. Y. 193, 196, or is based on the necessity of depriving the prisoner of potential means of escape, *Closson* v. *Morrison*, 47

N. H., 482, or on preventing the prisoner from destroying evidence otherwise properly subject to seizure, see *Reifsnyder* v. *Lee*, 44 Iowa 101, 103; *Holker* v. *Hennessy*, 141 Mo. 527, the right to search a prisoner upon lawful arrest was early settled in our law. 1 Bishop, *New Criminal Procedure* (4th ed., 1895) §§ 210 *et seq.*

A casual and uncritical application of this right to search the person of the prisoner has led some decisions in the lower federal courts to an unwarranted expansion of this narrow exception, with resulting inroads upon the overriding principle of the prohibition of the Fourth Amendment. Slight extensions from case to case gradually attain a considerable momentum from "judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but

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4 For purposes of present discussion, the validity of the arrest has been assumed. But its legality raises several serious questions. First, it is not clear whether the O. P. A. investigators or the New York City detectives made the arrest. The O. P. A. investigators, of course, have no authorization to make an arrest. Whether the New York detectives are authorized to make arrests for federal offenses is a debatable issue. See *Gambino* v. *United States*, 275 U. S. 310; *Marsh* v. *United States*, 29 F. 2d 172; § 20 (a) of the Emergency Price Control Act, 56 Stat. 23, 29, 50 U. S. C. App. § 924. Though local law makes provision for punishment of the same acts that are federal offenses in this regard, N. Y. Laws, 1942, c. 544, the arrest was made for a federal and not a state or local offense. If the New York law is controlling as to the validity of the arrest, however, it is within the power of any person to make an arrest for a crime, including a misdemeanor, in his presence. The common law rule restricted arrest without warrant for a misdemeanor to those acts which were breaches of the peace. Here again, there is the issue of whether the petitioner committed any misdemeanor in the presence of those making the arrest at the time the arrest was made. A recent decision by the English Court of Appeal focuses attention on this last question. In *Leachinsky* v. *Christie* (1945) [illegible], Lord Justice Scott makes clear why the legality of arrest turns on the justification which the arresting officer gives at the time of the arrest: "The law does not allow an arrest *in vacuo*, or without reason assigned, and the reason assigned must be that the arrest is for the purpose of prosecution on the self-same charge as is the justification for the arrest. It follows, and it is a principle lying at the very roots of English freedom, that if a man is arrested on one charge he is entitled to his release the moment prosecution of that charge is abandoned. The prosecution cannot arrest on one charge, abandon their intention to proceed on that charge and then keep him in cold storage, still nominally on that charge while they inquire into the possibility of putting forward a different charge. To do that they must first release him; then, when they propose to put forward some other charge, they can make the new charge the occasion for a new arrest." See also *Dumbell* v. *Roberts* (1945) [illegible] *People* v. *Marendi*, 213 N. Y. 600, 609 *et seq.* The *Law Quarterly Review*, in commenting on the *Leachinsky* case, pointed out: "An accused person has the right to know what the charge is against him so that, if he elects to speak he may have a fair and open chance of clearing himself at the earliest possible moment." 62 L. Q. Rev. at 4. It is to be noted that *Carroll* v. *United States*, 267 U. S. 132, 157, assumes the federal law of arrest to be the same as that of the English.

which, in reality, strike at the substance of the constitutional right." *Byars v. United States*, 273 U. S. 28, 33-34. In cases dealing with the search of the person it is natural to speak of the right to search and seize things "in his possession" without strict regard to the ambiguous scope of a man's "possession." From that, opinions slide readily to including the right to search and seize things "within the immediate control" of the arrested person, language appropriate enough when applied to goods which the arrested person was transporting at the time. Taken out of their original context, these phrases are used until they are made to include the entire premises in which the arrest takes place. Another factor enters. This language is sometimes used in cases involving the seizure of items properly subject to seizure because in open view at the time of arrest. But this last confusion is due to a failure to distinguish between the appropriate scope of a search on arrest and the very different problem as to the right of seizure where no search is in question.

It is important to keep clear the distinction between prohibited searches on the one hand and improper seizures on the other. See Mr. Justice Miller, in *Boyd* v. *United States*, 116 U. S. 616, 638, 641. Thus, it is unconstitutional to seize a person's private papers, though the search in which they were recovered was perfectly proper. *E. g., Gouled* v. *United States*, 255 U. S. 298. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure. *e. g., Amos* v. *United States*, 255

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5 *E. g., United States* v. *Wilson*, 163 Fed. 338, 340; *United States* v. *Murphy*, 264 Fed. 842, 844; *United States* v. *Snyder*, 278 Fed. 650, 658; *Maynard* v. *United States*, 23 F. 2d 141, 144; *cf. United States* v. *Welsh*, 247 Fed. 239; *Laughter* v. *United States*, 259 Fed. 94; *Donegan* v. *United States*, 287 Fed. 641; *Winkler* v. *United States*, 297 Fed. 202.

6 *E. g., Green* v. *United States*, 289 Fed. 236, 238; *Browne* v. *United States*, 290 Fed. 870, 875; *Garske* v. *United States*, 1 F. 2d 620; *Kwong How* v. *United States*, 71 F. 2d 71.

7 *E. g., Swan* v. *United States*, 295 Fed. 921; *Sayers* v. *United States*, 2 F. 2d 146; *United States* v. *Poller*, 43 F. 2d 911; *United States* v. *71.41 Ounces Gold Filled Scrap*, 94 F. 2d 17; *United States* v. *Feldman*, 104 F. 2d 255; *Matthew* v. *Correa*, 135 F. 2d 534; *United States* v. *Lindenfeld*, 142 F. 2d 829.

8 *E. g., Laney* v. *United States*, 294 Fed. 412, 416; *United States* v. *Chin On*, 297 Fed. 531, 533; *United States* v. *Seltzer*, 5 F. 2d 364; *Mattus* v. *United States*, 11 F. 2d 503; *Cheng Wai* v. *United States*, 125 F. 2d 915; *cf. United States* v. *Borkowski*, 268 Fed. 408; In re *Mobile*, 278 Fed. 949; *O'Connor* v. *United States*, 281 Fed. 396; *Vachina* v. *United States*, 283 Fed. 35; *Furlong* v. *United States*, 10 F. 2d 492; *United States* v. *Fischer*, 38 F. 2d 830.

U. S. 313; *Byars* v. *United States*, 273 U. S. 28; *Taylor* v. *United States*, 286 U. S. 1. And a search may be improper because of the object it seeks to uncover, *e. g.*, *Weeks* v. *United States*, 232 U. S. 383, 393-94, or because its scope extends beyond the constitutional bounds, *e. g.*, *Agnello* v. *United States*, 269 U. S. 20.

The course of decisions here has observed these important distinctions. The Court has not been indulgent towards inroads upon the Amendment. Only rarely have its dicta appeared to give undue scope to the right of search on arrest, and *Marron* v. *United States*, *supra*, is the only decision in which the dicta were reflected in the result. That case has been a source of confusion to the lower courts. Thus, the Circuit Court of Appeals for the Second Circuit felt that the *Marron* case required it to give a more restricted view to the prohibitions of the Fourth Amendment than that court had expounded in *United States* v. *Kirschenblatt*, *supra*, see *Go-Bart* v. *United States*, *sub nom.*, *United States* v. *Gowen*, 40 F. 2d 593, only to find itself reversed here, *Go-Bart* v. *United States*, *supra*, partly on the authority of the *Kirschenblatt* decision which, after the *Marron* case it thought it must disown. The uncritical application of the right of search on arrest in the *Marron* case has surely been displaced by *Go-Bart Co.* v. *United States*, *supra*, and even more drastically by *United States* v. *Lefkowitz*, *supra*, unless one is to infer that an earlier case qualifies later decisions although these later decisions have explicitly confined the earlier ~~decision~~ case.

In view of the jealousy with which this Court has applied the protection of the Fourth Amendment even where the search purported to take place under a proper warrant and there was the safeguard of judicial process in addition to the expressed judgment of the enforcement officials, see *e. g.*, *Grau* v. *United States*, 287 U. S. 124; *Sgro* v. *United States*, 287 U. S. 206, it was not to be expected that this Court should sanction searches on arrest that can be justified as reasonable only if securing evidence for purposes of the trial is a test of reasonableness for purposes of the Fourth Amendment. Such a view presupposes that the Fourth Amendment is obsolete and makes of the particularity of requirement for search warrants a mocking redundancy.

A final point. In this case the arrest was based on two misdemeanors, the sale of gasoline without the requisite coupons and

the sale of gasoline at a price over the O.P.A. ceilings. For neither of these offenses were coupons "instruments of the crime" in any sense in which that term is properly used. The exceptional right to search on arrest does not in any event extend to a search for articles necessary to the commission of a crime other than that for which the arrest was made. The officers could not have made an arrest of Davis for illegal possession of coupons, for which he was later tried, on mere suspicion. That crime, like the others, was only a misdemeanor, and no arrest can be made for a misdemeanor without a warrant unless it be committed in the presence of officers. Prior to the search, the officers had no basis for stating that he was committing the crime of illegal possession of the coupons in their presence.

It is too often felt, though not always avowed, that what is called nice observance of these constitutional safeguards makes apprehension and conviction of violators too difficult. Want of alertness and enterprise on the part of the law enforcers too often is the real obstruction to law enforcement. The present case affords a good instance.[9] The situation bears close resemblance to what Judge Learned Hand said on another occasion. "We are told that unless such evidence will serve, it will be impossible to suppress an evil of large proportion in the residential part of Brooklyn. Perhaps so; any community must choose between the impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution. But the danger is not certain, for the officers could have applied for a warrant which—as was at least intimated in Taylor v. United States—might then have been

[9] The petitioner's gas station was under suspicion for some weeks; yet action was finally taken as described in the opinion. Petitioner was arrested when he arrived at the gas station for sales above ceiling prices and sales without coupons. No arraignment was made for these offenses—instead the officers engaged in a search of the premises, which included the forced entry into the petitioner's office. He was then taken to the local O.P.A. headquarters. After several hours of questioning at O. P. A. headquarters, Davis was released. Not until one month later was the petitioner re-arrested and arraigned, and then for a charge entirely different from the ones for which the original arrest was made. The Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. App. §§ 901 *et seq.*, made adequate provision for effective enforcement of the statute. So far as securing documents and papers are concerned, the Administrator is equipped with the subpoena power, § 202(c), (d), (e); in addition, the Administrator has the power to seek injunction against the acts which the petitioner was accused of committing, § 205(a); and by appropriate proceedings the Administrator may seek the withdrawal of the license which the petitioner required to operate his business, § 205(f).

valid. It takes time to break up a still and take the parts away; if the attempt were made, it would discover itself immediately. One or more officers could have watched, while the others went to a judge or commissioner, whose action would at least have put a different face upon their subsequent proceeding." *United States* v. *Kaplan*, 89 F. (2d) 869, 871.

The Court in this case gives a new label to an old practice and to an old claim by police officials. But it happens that the old practice and the old claim now refurbished in a new verbal dress were the very practice and claim which infringed liberty as conceived by those who framed the Constitution and against which they erected the barriers of the Fourth Amendment. I am constrained to believe that today's decision flows from a view of the Fourth Amendment that is unmindful of the history that begot it and of the purpose for which it was included in the Bill of Rights. And the view of the Amendment which the Court rejects is confirmed by an impressive body of the laws of Congress and of the decisions of this Court. Stern enforcement of the criminal law is the hallmark of a healthy and self-confident society. But in our democracy such enforcement presupposes a moral atmosphere and a reliance upon intelligence whereby the effective administration of justice can be achieved with due regard for those civilized standards in the use of the criminal law which are formulated in our Bill of Rights. If great principles sometimes appear as finicky obstructions in bringing a criminal to heel, this admonition of a wise judge gives the final answer: "Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." Learned Hand, J. in *United States* v. *Kirschenblatt*, 16 F. 2d 202, 203.

APPENDIX.

SEARCH AND SEIZURE UNDER WARRANT*

A. *Place to be searched.*

Act of July 31, 1789, 29, 43 (dwelling house, store, building, or other place, by day); Act of August 4, 1790, 1 Stat. 145, 170 (dwelling house, store, building, or other place, by day); Act of March 3, 1791, 1 Stat. 199, 207 (any place, by day); Act of March 2, 1799, 1 Stat. 627, 677-78 (dwelling house, store, building, or other place, by day); Act of April 18, 1806, 2 Stat. 379, 380 (dwelling house, store, building, or other place, by day); Act of March 1, 1809, 2 Stat. 528, 530 (dwelling house, store, buildings, or other place, by day); Act of March 3, 1815, 3 Stat. 231, 232 (dwelling house, store, or other building, by day) (no warrant necessary to search a vehicle); Act of March 3, 1863, 12 Stat. 737, 740 (any place or premises); Act of February 28, 1865, 13 Stat. 441, 442 (buildings near boundary lines); Act of July 13, 1866, 14 Stat. 98, 152 (any premises); Act of March 2, 1867, 14 Stat. 546, 547 (any premises); Act of March 3, 1873, 17 Stat. 598, 599 (no limitation on scope); Act of April 25, 1882, 22 Stat. 49; (dwelling house, store building, or other place, by day); Act of February 10, 1891, 26 Stat 742 (any house, store, building, boat, or other place, by day); Act of August 27, 1894, 28 Stat. 509, 549-50 (no limitation on scope); Act of July 24, 1897, 30 Stat. 151, 209 (no limitation on scope); Act of March 3, 1899, 30 Stat. 1253, 1326 (any place in Alaska); Act of March 3, 1901, 31 Stat. 1189, 1337 (no limitation on scope); Act of August 5, 1909, 36 Stat. 11, 86 (no limitation on scope); Act of February 14, 1917, 39 Stat. 903, 906-907 (room, house, building, or other place in Alaska); Act of June 15, 1917, 40 Stat. 217, 228 (no limitation on scope); Act of July 3, 1918, 40 Stat. 755, 756 (any place); Act of October 28, 1919, 41 Stat. 305, 308 (see Act of June 15, 1917, *supra*); Act of September 21, 1922, 42 Stat. 858, 937, 983 (any place, dwelling house, store, or place on boundary line, by day); Act of June 7, 1924, 43 Stat. 650, 651 (no limitation on scope); Act of April

* Congress has passed numerous statutes authorizing inspection of defined premises and seizures without warrants. These are all very particularized acts, relating mostly to the inspection of vessels and vehicles and the seizure of various types of contraband goods. Most of this legislation comes within the exceptions historically recognized at the time of the adoption of the Fourth Amendment as to recapture of stolen goods and search of vehicles and vessels because of their fugitive nature. In such a mass of legislation, it would not be surprising if some of the specific acts fell afoul of the considerations which invalidated the legislation in the *Boyd* case, 116 U. S. 616. What is significant about this legislation is the recognition by Congress of the necessity for specific Congressional authorization even for the search of vessels and other moving vehicles and the seizures of goods technicaly contraband.

23, 1928, 45 Stat. 448, 449 (no limitation on scope); Act of February 18, 1929, 45 Stat. 1222, 1225 (see Act of July 3, 1918, *supra*); Act of June 17, 1930, 46 Stat. 590, 752 (dwelling house, by day, store, or other building or place); Act of July 7, 1930, 46 Stat. 845, 846 (no limitation on scope); Act of June 15, 1935, 49 Stat. 378, 381 (no limitation on scope); Act of August 27, 1935, 49 Stat. 872, 874-875 (see Act of June 15, 1917, *supra*); Act of April 5, 1938, 52 Stat. 198, 199 (any place in District of Columbia); Act of February 10, 1939, 53 Stat. 1, 436 (no limitation on scope); Act of June 28, 1940, 54 Stat. 670, 671 (no limitation on scope); Act of July 1, 1943, 57 Stat. 301, 304 (no limitation on scope); Act of February 26, 1944, 58 Stat. 100, 102 (any person, vessel, or place).

B. *Objects of Search and Seizure.*

Act of July 31, 1789, 1 Stat. 29, 43 (goods subject to duty); Act of August 4, 1790, 1 Stat. 145, 170 (goods subject to duty); Act of March 3, 1791, 1 Stat. 199, 207 (liquors fraudulently deposited, hid, or concealed); Act of March 2, 1799, 1 Stat. 627, 677-78 (goods subject to duty); Act of April 18, 1806, 2 Stat. 379, 380 (articles imported from Great Britain); Act of March 1, 1809, 2 Stat. 528, 530 (articles imported from Great Britain or France); Act of March 3, 1815, 3 Stat. 231, 232 (articles subject to duty); Act of March 3, 1863, 12 Stat. 737, 740 (invoices, papers, and books relating to customs frauds); Act of February 28, 1865, 13 Stat. 441, 442 (dutiable goods); Act of July 13, 1866, 14 Stat. 98, 152 (fraud on the revenue); Act of July 13, 1866, 14 Stat. 178, 187 (fraud on the revenue); Act of March 2, 1867, 14 Stat. 546, 547 (invoices, books, and papers relating to customs frauds); Act of March 3, 1873, 17 Stat. 598, 599 (obscene literature, literature about contraceptives, contraceptive materials); Act of April 25, 1882, 22 Stat. 49 (merchandise on which duty is unpaid); Act of February 10, 1891, 26 Stat. 742, 743 (counterfeit money, coins, etc., and materials used for their manufacture); Act of August 27, 1894, 28 Stat. 509, 549-50 (obscene and immoral literature and articles, lottery tickets); Act of July 24, 1897, 30 Stat. 151, 209 (obscene and immoral articles and literature, contraceptive and abortive materials, lottery tickets); Act of March 3, 1899, 30 Stat. 1253, 1326 (embezzled or stolen property; articles used to commit a felony; property to be used to commit a crime); Act of March 3, 1901, 31 Stat. 1189, 1337 (stolen or embezzled goods, counterfeit coins, etc. and materials used to make them, literature of obscene nature, immoral articles, gambling equiment, lottery tickets); Act of August 5, 1909, 36 Stat. 11, 86 (obscene or immoral literature or articles, drugs, objects for abortion, lottery tickets); Act of February 14, 1917, 39 Stat. 903, 906-907 (illegally held liquor); Act of June 15, 1917, 40 Stat. 217, 228 (stolen or embezzled property; property used in commission of a felony; property used to aid unlaw-

fully a foreign government); Act of July 3, 1918, 40 Stat. 755, 756 (illegally secured migratory birds or bird products); Act of October 28, 1919, 41 Stat. 305, 308 (alcoholic beverages); Act of September 21, 1922, 42 Stat. 858, 937, 983 (obscene literature, drugs for abortion, contraceptive items, lottery tickets; illegal imports); Act of June 7, 1924, 43 Stat. 650, 651 (wild life and fish improperly taken from refuge); Act of April 23, 1928, 45 Stat. 448, 449 (migratory birds improperly taken from bird refuge); Act of February 18, 1929, 45 Stat. 1222, 1225 (see Act of July 3, 1918, *supra*); Act of June 17, 1930, 46 Stat. 590, 752 (merchandise on which duties unpaid); Act of July 7, 1930, 46 Stat. 845, 846 (illegally caught black bass); Act of June 15, 1935, 49 Stat. 378, 381 (illegally captured game and wild life and products thereof shipped in interstate commerce); Act of August 27, 1935, 49 Stat. 872, 874-75 (illegally possessed liquor); Act of April 5, 1938, 52 Stat. 198, 199 (lottery tickets, gaming devices, books for recording gambling transactions, stolen and embezzled property, forged and counterfeit materials, equipment used for counterfeiting, obscene and immoral literature and materials); Act of February 10, 1939, 53 Stat. 1, 436 (frauds on the revenue); Act of June 28, 1940, 54 Stat. 670, 671 (subversive materials); Act of July 1, 1943, 57 Stat. 301, 304 (Alaskan game illegally taken and equipment used to make captures); Act of February 26, 1944, 58 Stat. 100, 102 (illegally taken seal products and equipment used to aid in the takings).

C. *Requirements for issuance of warrant.*

Act of July 31, 1789, 1 Stat. 29, 43 (suspicion of concealment of goods, application on oath or affirmation before justice of the peace); Act of August 4, 1790, 1 Stat. 145, 170 (suspicion of concealment, application on oath or affirmation before justice of the peace); Act of March 3, 1791, 1 Stat. 199, 207 (oath or affirmation, establishing grounds for reasonable cause for suspicion, before U. S. judge or justice of the peace); Act of March 2, 1799, 1 Stat. 627, 677-78 (suspicion of concealment, application, on oath, to justice of the peace); Act of April 18, 1806, 2 Stat. 379, 380 (same); Act of March 1, 1809, 2 Stat. 528, 530 (same); Act of March 3, 1815, 3 Stat. 231, 232 (suspicion of concealment, proper application, on oath, to any judge or justice of the peace); Act of March 3, 1863, 12 Stat. 737, 740 (affidavit establishing fraud or attempted fraud to satisfaction of U. S. district judge); Act of February 28, 1865, 13 Stat. 441, 442 (oath showing belief or reason to believe that smuggled goods are kept on the premises); Act of July 13, 1866, 14 Stat. 98, 152 (oath in writing before U. S. circuit or district judge or commissioner, setting forth belief or reason to believe fraud on revenue committed on premises); Act of July 18, 1866, 14 Stat. 178, 187 (may be issued by any district judge); Act of March 2, 1867, 14 Stat. 546, 547 (complaint and affidavit,

to satisfaction of U. S. district judge, of customs fraud); Act of March 3, 1873, 17 Stat. 598, 599 (written complaint of violation of statute, before U. S. district or circuit judge, setting forth belief or basis for belief, to satisfaction of judge, supported by oath or affirmation; Act of April 25, 1882, 22 Stat. 49 (proper application, on oath, to justice of the peace, district judge of cities, police justice, or U. S. district or circuit judge), Act of February 10, 1891, 26 Stat. 742, 743 (proper oath or affirmation, showing probable cause for belief that statute is being violated); Act of August 27, 1894, 28 Stat. 509, 549-50 (complaint in writing, founded on knowledge or belief, setting forth grounds for belief, supported by oath or affirmation, to the satisfaction of U. S. district or circuit judge); Act of July 24, 1897, 30 Stat. 151, 209 (complaint in writing of violation of act, to satisfaction of U. S. district or circuit judge, founded on knowledge or belief, setting forth basis for belief, and supported by oath or affirmation); Act of March 3, 1899, 30 Stat. 1253, 1326 (probable cause, shown by affidavit, naming or describing person, describing the property and the place to be searched, to the satisfaction of an examining magistrate); Act of March 3, 1901, 31 Stat. 1189, 1337 (complaint, under oath, before police court or justice of the peace, setting forth belief and cause for belief of concealment in any place of specified articles, describing the place to be searched and the property to be seized); Act of August 5, 1909, 36 Stat. 11, 86 (complaint in writing before U. S. circuit or district judge of violation of act, to the satisfaction of the judge, setting forth grounds for belief and supported by oath or affirmation, a warrant may issue "conformably to the Constitution"); Act of February 14, 1917, 39 Stat. 903, 906-907 (charge, on oath or affirmation, before Alaskan district attorney, of violation of prohibition laws; place where violation occurred to be specifically described); Act of June 15, 1917, 40 Stat. 217, 228-29 (affidavits or depositions, setting forth facts establishing grounds or probable cause for belief that grounds exist, before U. S. or State judge, or U. S. commissioner); Act of July 3, 1918, 40 Stat. 755, 756 (proper oath or affirmation before U. S. judge or commissioner, showing probable cause of violation of the statute); Act of October 28, 1919, 41 Stat. 305, 308 (see Act of June 15, 1917, *supra*); Act of September 21, 1922, 42 Stat. 858, 937, 983 (complaint in writing before U. S. district judge, alleging violation of statute, founded on probable cause and supported by oath or affirmation and conformable to the requirements of the Constitution; cause to suspect presence of dutiable goods, application under oath before justice of the peace, local, or State, or federal judges); Act of June 7, 1924, 43 Stat. 650, 651 (proper oath or affirmation before U. S. judge or commissioner showing probable cause of violation); Act of April 23, 1928, 45 Stat. 448, 449 (proper oath or affirmation, before U. S. judge or

commissioner, showing probable cause of violation of statute); Act of February 18, 1929, 45 Stat. 1222, 1225 (see Act of July 3, 1918, *supra*); Act of June 17, 1930, 46 Stat. 590, 752 (suspicion of concealment of dutiable goods, application under oath to any justice of the peace, local, State, or federal judge); Act of July 7, 1930, 46 Stat. 845, 846 (proper oath or affirmation before U. S. judge or commissioner establishing probable cause that statute was violated); Act of June 15, 1935, 49 Stat. 378, 381 (proper oath or affirmation before U. S. judge or commissioner establishing probable cause that statute violated); Act of August 27, 1935, 49 Stat. 872, 874-75 (see Act of June 15, 1917, *supra*); Act of April 5, 1938, 52 Stat. 198, 199 (complaint under oath, before the police court for the District of Columbia, setting forth belief or cause for belief, particularly describing the place to be searched, the articles to be seized); Act of February 10, 1939, 53 Stat. 1, 436 (oath in writing before U. S. district judge or commissioner, setting forth reason to believe that fraud on revenue committed or being committed); Act of June 28, 1940, 54 Stat. 670, 671 (see Act of June 15, 1917, *supra*); Act of July 1, 1943, 57 Stat. 301, 304 (proper oath or affirmation, showing probable cause of violation of Alaskan game laws, before U. S. judge or commissioner); Act of February 26, 1944, 58 Stat. 100, 102 (oath or affirmation before U. S. judge or commissioner, showing probable cause of violation of statute).

Mr. Justice RUTLEDGE, dissenting.

I am substantially in accord with the views expressed by Mr. Justice Frankfurter in his exhaustive opinion as to the controlling principles which should govern in the disposition of this case. Perhaps it should be added that the evidence does not clearly show that the officer who flashed the light into the window was in fact attempting to open it by force or to do more than observe the interior. But the situation was such that his action clearly created in Davis' mind the impression that he either was entering by force or intended to do so. It therefore must be taken, I think, that Davis' so-called consent was induced by this apparent compulsion, the very kind of thing the Fourth Amendment was designed to prevent. There was no such consent as would legalize the entry and search.

Moreover, whatever may be the scope of search incident to lawful arrest for a misdemeanor, I know of no decision which goes so far as to rule that this right of search extends to breaking and entering locked premises by force. That was not done here. But the search followed on consent given in the reasonable belief that it was necessary to avoid the breaking and entry. I think it was therefore in no better case legally than if in fact the breaking and forceable entry had occurred. The search was justified neither by consent nor by the doctrine of reasonable search as incident to a lawful arrest.